IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 12-cr-00258-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN PAETSCH,

Defendant.

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

The defendant, Christian Paetsch, by and through undersigned counsel, Assistant Federal Public Defender, Matthew K. Belcher, moves this Court to suppress all evidence obtained subsequent to the illegal seizure and arrest of Mr. Paetsch including, but not limited to, the two firearms, ammunition, bank band, clothing, license plates, and money seized from Mr. Paetsch's white Ford Expedition, license plate 37FLCK, on June 2, 2012, as well as all statements made by Mr. Paetsch subsequent to his illegal seizure and arrest on the grounds that they were obtained in violation of his rights under the Fourth and Fifth Amendments to the United States Constitution. In support thereof, Mr. Paetsch would show as follows:

I. FACTUAL BACKGROUND

1. *An armed robbery occurred at Wells Fargo Bank.*

According to discovery provided thus far, on June 2, 2012 at approximately 3:45 p.m., the Wells Fargo Bank located at 15301 East Hampden Avenue in Aurora, Colorado was robbed. A single armed robber stole $25, 830 and escaped either on foot or by bicycle. The Aurora Police

were dispatched to the crime scene shortly thereafter. Witnesses could only offer a vague description of the robber whom they described as wearing a dark hoodie, gloves, a mask and sunglasses. The robber was armed with a handgun.

There was a "Sierra note" global positioning satellite ("GPS") in the bag of the stolen money that, once out of the bank, emitted signals communicating its location to the Aurora Police Department through designated computers in "real time."

The Aurora Police immediately sent out requests for police assistance. Aurora Police Dispatch tracked the GPS signal and radioed the signal's movements to the responding officers. The GPS tracker did not provide a pinpoint location of the stolen money, rather it appeared to give location information accurate to within approximately 30 feet. It also appeared that during surveillance, the tracker transmitted signals that varied in strength from weak to strong. At one point, the tracker remained stationary, emitting signals from a residence located at 15781 East Greenwood Drive. The tracker then showed that the money was traveling eastbound on Iliff Avenue and stopped at the Iliff and South Buckley Road intersection. This led to a decision to block all eastbound traffic at Iliff/Buckley intersection at 3:49 p.m. It is unclear who issued the order to block the traffic, but it appears that Lieutenant Lertch was the supervising officer at the scene.

2. *Officers initiate a dragnet seizure, barricading 20-25 cars at the Iliff/Buckley intersection in order to conduct a mass arrest.*

A perimeter was established blocking the eastbound lanes and officers were located at all four corners of the intersection. The officers left their police lights flashing and drew their weapons. Approximately 20-25 cars were contained within the barricade and held in the two left-

hand turning lanes of the intersection. While setting up the perimeter, officers mounted their guns on the roofs of their patrol cars, aiming their guns directly at the passengers. The officers then ordered everyone in custody to hold their hands outside of their car windows. Drivers were forced to hold their hands outside of their cars for up to an hour. One woman reported that the police would not allow her to put her car in park and she was forced to keep her foot on the brake while her hands were displayed. Additionally, no one was permitted to use their cell phone to contact their families or use their hands to aid their young children seated in the back of their cars.

By 4:30 p.m., there were over 30 officers who had responded to the scene. Lieutenant Lertch worked with his sergeants, including Sergeant Matthew Brukbacher, on a plan to survey the vehicles. The GPS tracker was not working well at the scene and the officers had no vehicle information and very little suspect information. An arrest team was formed with the primary goals to arrest every driver and search their vehicles while waiting for the FBI Safe Streets investigator, Thomas Acierno, to arrive with the "ESP Currency Tracking Pack." The "ESP" tracker was capable of pinpointing the GPS signal. Investigator Acierno arrived at the scene at approximately 4:40 p.m. Several cars were cleared and several individuals were arrested prior to Acierno's arrival. It is believed that Mr. Paetsch was parked near the front of the line of cars and was one of the first people arrested.

After Acierno arrived on the scene, he began scanning the cars with a handheld "ESP Currency Tracking Pack." Simultaneously, the arrest team continued removing each individual from their car, handcuffing them and placing them on the southern curb-line of Iliff Avenue. Individuals being arrested were removed from their car at gunpoint and the officers guarding

those arrested kept their weapons drawn at all times. In total, the officers arrested approximately 40 men and women. Some mothers with young children were permitted to stay in their cars with their children, uncuffed, while others were not. Those children left in their cars, however, were not permitted to join their parents in the front seat or use the restroom. At least one four-year-old girl was forced to urinate on herself while strapped in her car seat. Children as young as six years old were physically pushed by the officers towards the curb to be detained. Also, at least one African-American mother was arrested in front of her eleven-year-old son. The mother and son were driving home from a pool party, still dressed in their bathing suits, when the police barricaded the cars. When the arrest team reached their car, the officers ordered the mother to crawl out of the passenger-side door and then handcuffed her in front of her son. The two were both guarded on the curb.

After each occupant was arrested and removed to the curb, officers conducted preliminary plain-view searches of the cars and requested written consents to search each car. Officers looked through the heavily tinted windows of Mr. Paetsch's car at the time he was arrested. Officers did not discover any evidence of the crime at the time they forcibly removed Mr. Paetsch from his Ford Expedition. Upon his arrest, Mr. Paetsch was kept in custody together with a group of several other passengers. The officers continued arresting the remaining occupants and searched the remaining cars after Mr. Paetsch's initial arrest.

3. *Mr. Paetsch's arrest, the "ESP" tracker and the search of his white Ford Expedition.*

a. Mr. Paetsch's initial arrest.

As described above, Mr. Paetsch was one of the first motorists taken into custody when the arrest team began surveying the cars. About 45 minutes to an hour after all the cars were barricaded, officers removed Mr. Paetsch from his car at gunpoint and placed him in handcuffs. He and several other individuals were kept in custody with armed officers on the southeast curb of the road. After the preliminary plain-view searches were conducted, officers asked each handcuffed individual to sign written consent forms to search their cars. Officer Benedict asked Mr. Paetsch to consent to search his car. Mr. Paetsch refused and stated "I want to speak with my lawyer." At this point, Mr. Paetsch was not considered a suspect.

b. The "ESP" handheld tracker detected a signal from Mr. Paetsch's vehicle and officers claim to have discovered a $2000 bank band after he was arrested.

Investigator Acierno arrived on the scene about one hour after the cars were seized and surrounded by armed law enforcement agents. While the officers systematically arrested the passengers of the stopped vehicles, Acierno scanned the cars to detect the GPS signal with an "ESP Currency Tracking Pack." Acierno received two weak signals from two different cars: (1) Mr. Paetsch's white Ford Expedition which was stopped in lane four of the roadway, approximately 50 yards from the intersection; and (2) from a car parked next to the Expedition.

After the weak signal was detected at Mr. Paetsch's car, officers claim they conducted a second plain-view search through Mr. Paetsch's heavily tinted windows and discovered a $2000 bank band or cash-strap lying on the front passenger seat of his car. Acierno confirmed that he

saw the bank band. At this point, Acierno requested that FBI Agent Patrick Williams join the investigation because of his prior experience with the "ESP" tracker and Mr. Paetsch was removed to the backseat of Officer Jensen's patrol car. He remained cuffed at all times.

FBI Agents Patrick Williams and Chris Langley arrive on-scene at an unknown time. (Acierno initially began scanning vehicles sometime after 4:40 p.m.). Williams fine-tuned the "ESP" tracker and began re-scanning all the cars. Williams then detected a strong signal from only Mr. Paetsch's Expedition.

c. Officers searched Mr. Paetsch's vehicle without a valid consent to search.

After the GPS signal is pinpointed to Mr. Paetsch's car, Officer Dediemar asked Mr. Paetsch again to consent to search his car. This occurred while he was handcuffed in the back of Officer Jensen's patrol car. Mr. Paetsch refused and stated "I told the officer that I did not want anyone to look in my vehicle." Officer Dediemar continued to pressure Mr. Paetsch and, eventually, Mr. Paetsch submitted to his request. Officer Benedict removed Mr. Paetsch's handcuffs so that he could sign the written consent to search form. Shortly thereafter, Detective Thrapp was notified by Sergeant Braunlich of the circumstances of Mr. Paetsch's consent and that he had previously requested to speak to his attorney. Agent Thrapp advised the officers on-scene that Mr. Paetsch's consent waiver was, consequently, invalid.

The officers proceeded with the search on the basis of the bank band they claim was discovered in plain-view after Mr. Paetsch was arrested. Just before the car search began, Mr. Paetsch admitted that there were two firearms inside the car. Officers Roberson and McDowell performed the search. Agent Williams assisted. The search yielded the discovery of:

(1) $2,000 bank band on the front passenger seat;

(2) small figure skating bag containing binoculars on the front passenger seat;

(3) blue bag on the front passenger floorboard containing a .22-caliber firearm, sport coat, wig, gun holster, "disguise" kit, bald cap, unopened air-horn (packaged); empty air-horn package, black latex gloves;

(4) black wallet with Mr. Paetsch's identification on the front passenger seat;

(5) black iPhone and iPad on top of front center console;

(6) gardening-style gloves inside center console;

(7) Colorado car registration in glove box;

(8) Two photocopied Colorado license plates in holders with plate number 600HAA in rear tailgate area;

(9) black bag with camera in rear passenger-side seat;

(10) grey/black bag containing safety deposit box key in rear passenger floorboard;

(11) mail to Mr. Paetsch from Wells Fargo Bank under rear passenger seat;

(12) white latex gloves in driver-side door;

(13) checks for Jessica Paetsch for Wells Fargo Bank in driver-side door;

(14) silver box with a loaded 9mm semi-automatic firearm , two separate loaded magazines, and additional boxes of ammunition in rear driver-side;

(15) black shooting targets in rear of vehicle;

(16) black latex gloves in rear of vehicle;

(17) $22, 956.

After the car was searched, Officer Jensen took Mr. Paetsch to the Aurora Police Department Jail at approximately 5:40 p.m. where he was booked. Officer Jensen later escorted Mr. Paetsch to the Denver Jail for a U.S. Marshall hold, transferring custody at 10:30 p.m.

II. LAW AND ARGUMENT

"[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895 (1975). A principle tenet of the Fourth Amendment is the requirement that searches and seizures are reasonable and ordinarily require warrants issued, based on probable cause. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Further, reasonable searches and seizures necessarily "limit[] police use of unnecessarily frightening or offensive methods of surveillance and investigation." *Ortiz*, 422 U.S. at 891; *see*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 531 (1967); *Schmerber v. California*, 384 U.S. 757, 771-72 (1966).

Police and citizen encounters come in three varieties. The first involves the voluntary cooperation of a citizen in response to noncoercive questioning. *See United States v. Madrid*, 30 F.3d 1269, 1275 (10th Cir. 1994). The second is a *Terry*-stop, involving a brief, non-intrusive detention and frisk for weapons when officers have a reasonable suspicion that a person committed a crime or is about to do so. *See Terry*, 392 U.S. at 16. The third type of encounter is an arrest based upon either a warrant or probable cause. *See Madrid*, 30 F.3d at 1275.

Here, Mr. Paetsch was arrested after Aurora police officers barricaded his car at a major city intersection. A traffic stop is a "seizure within the meaning of the Fourth Amendment." *See*, *e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). *United States v. Williams*, 271 F.3d 1262, 1266 (10th Cir. 2001). Analogizing a traffic stop, the Tenth Circuit has held that courts should analyze such stops under *Terry*. *See id.* at 1266 (*citing United States v. Hunnicut*, 135 F.3d 1345,

1348 (10th Cir. 1998)). As a result, this Court must determine whether Mr. Paetsch's stop was justified at its inception and "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (*quoting Terry*, 392 U.S. at 20). This Court must also consider whether the detaining officers had a ***particularized and objective basis*** for suspecting legal wrongdoing.'" *United States v. Neff*, – F.3d ----, 2012 WL 1995064, slip op. *3 (10th Cir. June 5, 2012) (*quoting United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotations omitted) (emphasis added). Under any review of the facts, Mr. Paetsch's seizure was not based on individualized, reasonable suspicion and was therefore unjustified at its inception. Nor was his resulting arrest based upon probable cause. Accordingly, all physical evidence seized from Mr. Paetsch's car and his statements given at the scene must be suppressed.

1. *Mr. Paetsch was stopped as part of a dragnet seizure for the police to conduct a mass arrest. The police officers had neither individualized reasonable suspicion to stop and detain Mr. Paetsch's car nor probable cause to arrest him once detained.*

   a. <u>The traffic stop was not supported by reasonable suspicion.</u>

In *United States v. Cortez*, 449 U.S. 411 (1981), the Supreme Court considered what standard a police officer must satisfy in order to make a traffic stop. The Court stated that there must be a suspicion that the "***particular individual*** being stopped is engaged in wrongdoing." *Id*. at 418 (emphasis added); "This demand for specificity in the information upon which the police action is predicated is the central teaching of [the Supreme Court's] Fourth Amendment jurisprudence." *Id*.; *see*, *e.g.*, *In re A.S.*, 614 A.2d 534, 540 (D.C. Cir. 1992) (The kind of dragnet seizure of three youths who resembled a generalized description cannot be squared with the long-standing requirement for particularized individualized suspicion."). Aurora police

officers had no reasonable suspicion that any *individual* driver, and specifically not Mr. Paetsch, was a suspect in the armed robbery when officers barricaded 25 cars and arrested up to 40 people at the Iliff/Buckley intersection. The only information that the police relied upon to conduct the barricade was the signal from the GPS tracker.

Critically, the GPS tracker was incapable of pinpointing the stolen money's location. While the signal provided officers with a general geographic location, officers had no identifying descriptions of either the robber or the getaway car that would narrow their investigation once the cars were detained. As a result, officers blindly stopped all cars at the intersection with the chief goal to indiscriminately arrest all passengers at gunpoint. While "*Terry* accepts the risk that officers may stop innocent people," *Illinois v. Wardlow*, 528 U.S. 119, 126, (2000), "[t]he articulated factors together ***must serve to eliminate a substantial portion of innocent travelers*** before the requirement of reasonable suspicion will be satisfied." *United States v. Brugal*, 209 F.3d 353, 359 (4th Cir.2000) (en banc) (emphasis added); *see also United States v. Dell*, 2012 WL 2443416, slip op. *5 (10th Cir. June 28, 2012) ("[A]lthough *Terry* in some circumstances allows the police to briefly detain individuals without probable cause for an arrest, '*any* curtailment of a person's liberty by the police must be supported by at least a reasonable and articulable suspicion that the ***person seized*** is engaged in criminal activity.'") (*quoting Reid v. Georgia*, 448 U.S. 438, 440 (1980) (emphasis added).

b. Mr. Paetsch's arrest was not supported by probable cause.

Law enforcement must either have an arrest warrant or possess probable cause to arrest an individual. *See Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008). "Probable cause to arrest exists where, under the totality of the circumstances, a reasonable person would believe that an

offense has been committed by the person arrested." *United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010) (internal quotation marks omitted) (emphasis added). The probable cause inquiry is an objective one. Additionally, arrests are characterized by the intrusive or lengthy nature of the detention. *See Oliver v. Woods*, 209 F.3d 1179, 1186 (10th Cir. 2000). A detention ceases to be a *Terry* stop and becomes an arrest if it continues for an excessive time period or closely resembles a traditional arrest. *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186 (2004); *see also United States v. Shareef*, 100 F.3d 1491, 1507 (10th Cir.1996) ("an unreasonable level of force transforms a *Terry* detention into an arrest requiring probable cause").

Here, after officers barricaded all the cars within the armed Iliff/Buckley perimeter, the arrest team stopped at each car and: (1) removed all passengers at gunpoint; (2) handcuffed each passenger; (3) kept them under guard; and (4) detained the passengers for at least two and half hours. Mr. Paetsch was one of the first individuals arrested. He was arrested before FBI Agent Acierno arrived and employed the handheld tracking device to scan the cars and locate the signal.

Further, if particularized suspicion is required for a traffic stop, and traffic stops are considered "less stringent" than the probable cause standard, then surely particularized suspicion must also be required to satisfy the more demanding test of probable cause for arrests. *See United States v. Wai-Keung*, 115 F.3d 874, 879 (11th Cir. 1997). Again, the barricade and each arrest, including Mr. Paetsch's, were based solely on the GPS tracking signal that dispatch was following at headquarters. The police had no identifying information at the time Mr. Paetsch and the rest of the passengers were taken into custody. The only "tip" the officers had was the general location of the stolen money. That information, alone, did not empower the officers with

excessive discretion to stop, search and arrest a large numbers of citizens. *See*, *e.g.*, *Sibron v. New York*, 392 U.S. 40. 62, 88 (1968) (stating that no probable cause could exist to arrest where an officer had no information concerning the defendant, saw the defendant talking to a number of known drug addicts for several hours, and could not hear what the defendant was saying to the addicts); *Davis v. Mississippi*, 394 U.S. 721 (1969) (dragnet detention and fingerprinting of black men fitting general description of perpetrator of crime held to violate the Fourth Amendment).

2. *The police barricade was not a constitutional roadblock.*

Roadblocks that are properly tailored to detect evidence of a particular criminal wrongdoing rather than for general crime control are not *per se* unconstitutional and may be permissible even absent individualized suspicion. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *see also City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). In *Carroll v. United States*, 267 U.S. 132, 154 (1925), however, the Supreme Court stated, "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless ***there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.***" *Id.* at 44 (emphasis added).

In *Brown v. Texas*, 443 U.S. 47 (1979), the Supreme Court determined that "the Fourth Amendment requires that a seizure must [either] be based on ***specific, objective*** facts indicating that society's legitimate interests require the seizure of the ***particular*** individual" or be performed pursuant to a plan embodying neutral limitations. *Id.* at 51 (emphasis added); *see also Prouse*, 440 U.S. at 662 (stating that checkpoint inspections when not undertaken pursuant to previously specified neutral criteria, must be accompanied by ***individualized***, articulable

suspicion.). Given that the officers had no reasonable, individualized suspicion that would apply to any particular driver at the time the motorists were stopped, the roadblock must meet the requirements of a neutral public policy plan. The Iliff/Buckley police barricade does not.

The hallmark of a constitutionally permissible roadblock or checkpoint is it is less intrusive than a traditional arrest. Typically, appropriately tailored roadblocks are those where: (1) the primary law enforcement purpose is not to determine whether a vehicle's occupants are committing a crime; (2) there are notifications to the drivers that they are entering a roadblock or checkpoint where they will be detained; (3) drivers are able to avoid the roadblock or checkpoint; and (4) the stops and searches are brief in time and minimally intrusive. *See*, *e.g. Lidster*, 540 U.S. at 889 (brief stops of motorists at highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (state's use of a highway sobriety checkpoint did not *per se* violate the Fourth Amendment). In *Sitz*, which considered the validity of a sobriety checkpoint, the Supreme Court specifically noted that the issue of whether any individual was treated unreasonably after they were detained was not before the Court, but observed that individual detention of any particular motorists may "require satisfaction of an individualized suspicion standard." *See Sitz*, 496 U.S. at 450-51 (relying on *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976).

In assessing the reasonableness of a police checkpoint, Courts are directed to apply the three-pronged balancing test outlined in *Brown v. Texas*: "'(1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. at 50-51.

Admittedly, law enforcement and the citizens of Aurora had a substantial interest in apprehending the armed robber and the money stolen from Wells Fargo. However, the manner in which Aurora Police Department pursued capturing the suspect was not narrowly tailored and the objective intrusion on these motorists' civil liberties was anything but minimal and brief.

First, *Terry* generally requires that law enforcement must use the least offensive procedure which will thwart the danger giving rise to the need for the procedure in the first instance. That is, in this instance, the implementation of the roadblock could be no greater than what was reasonably necessary to locate the GPS tracking signal or the stolen money. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.7 (2011); *Terry*, 392 U.S. at 20 (intrusions must be "reasonably related in scope to the circumstances which justified the interference in the first place"). Given that the "basic purpose" of the Fourth Amendment is to safeguard individuals from "arbitrary invasions" by law enforcement, *Camara*, 387 U.S. at 528, it is important that this Court examine the manner in which the motorists caught by the barricade were selected and narrowed.

The GPS tracker did signal a general geographic location for the stolen money. What the signal did not do, however, was offer a pinpoint location, any description of the vehicle or driver of the car, or even necessarily imply that the armed robber was driving with the money. The strength of the signal varied as dispatch monitored its movements and the officers had no assurances that the signal was necessarily accurate at the time of the stop. The officers lacked even a generalized description of the suspect or getaway car. Consequently, the police were keenly aware that they were blindly and arbitrarily detaining a large number of people in deciding to barricade the cars at the Iliff/Buckley intersection. The officers were closely monitoring the

signal and had close to 30 police officers investigating the crime at the time. There was no objective reason that the officers could not continue monitoring the GPS tracker until the vehicle carrying the signal was identified or the suspected vehicles were narrowed so that the number of individuals that would be seized at a traffic stop or roadblock was limited.

More significantly, by any measure, the intrusion on the motorists' individual liberties in this barricade was severe and extensive. Mr. Paestch and the occupants of the vehicles were not required to wait "a very few minutes at most," have police contact for "only a few seconds" that consisted "simply of a request for information." *Lidster*, 540 U.S. at 427-28. The manner by which these motorists were shut in by the officers could not have been more terrifying. Police officers blocked the road and set up a perimeter with their guns mounted on top of patrol cars and aimed directly at all of the passengers. An arrest team surveyed each car and removed each occupant at gunpoint, placed them in handcuffs and took them into custody. All arrested passengers, including their children, were guarded by officers brandishing weapons. The flagrant misconduct by these officers is inexcusable. Dozens of individuals' lives were threatened by these officers based solely on the GPS tracking signal. Accordingly, this police barricade far exceeded any exceptions that less intrusive roadblocks or checkpoints provide officers to detain individuals.

3. *Mr. Paetsch's subsequent consent to search and any custodial statements are tainted by the preceding 4th Amendment violations and must be suppressed*

Whether a consensual consent to search preceded by a Fourth Amendment violation is sufficiently an act of free will to purge the primary taint of the illegal arrest depends upon whether it is voluntary in fact, which in turn depends upon the totality of circumstances

surrounding the consent. *United States v. Guzman*, 864 F.2d 1512, 1520-21 (10th Cir. 1988) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). In applying the *Schneckloth* voluntariness test to consents to search obtained subsequent to Fourth Amendment violations, the Tenth Circuit has considered the three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975), which also apply to custodial statements and confessions. These factors include: (1) the temporal proximity of the arrest and the confession; (2) the presence of intervening circumstances; and particularly (3) the purpose and flagrancy of the official misconduct. *Id*. at 603-04.

Here, the officers' illegal seizure of Mr. Paetsch without any particular, individualized suspicion that he had, was, or was about to commit a crime, followed closely by the illegal arrest of Mr. Paetsch without a warrant or probable cause to believe he had committed a crime, were temporally proximate in time to Mr. Paetsch's written consent to search the vehicle and subsequent custodial statements – separated at most by an hour, possibly less. Additionally, during the limited amount of time elapsing between the illegal seizure, arrest, and written consent, no intervening circumstances occurred that could have possibly dissipated the taint of the 4th Amendment violations. Furthermore, the purpose and flagrancy of the officers' violations dramatically increase the taint flowing from the Fourth Amendment violations. The arresting officers' purposely barricaded in, then surrounded Mr. Paetsch and the additional 40 or so individuals within the armed perimeter for the sole purpose of arresting each and every individual without a warrant or probable cause. One by one, each individual, including Mr. Paetsch, were forced at gun point from their vehicles, handcuffed, and placed on the street curb under the watch of armed police officers. All of this occurred before the officers' questioned Mr. Paetsch as to

consent to search his vehicle and the contents of his vehicle.

Mr. Paetsch's written consent to search his vehicle and his custodial statements made in response to police questioning was obtained immediately after his warrantless, unconstitutional seizure and arrest, no intervening circumstances took place to dissipate the taint of these 4th Amendment violations, and the purpose and flagrancy of the officers' violations were such to warrant the conclusion that the consent and subsequent custodial statements are tainted and, therefore, must be suppressed.

4. *Mr. Paetsch's subsequent consent to search and custodial statements were also obtained in violation of the 5th Amendment and must be suppressed*

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." In *United States v. Edwards*, 451 U.S. 477, 484-85 (1981), the Supreme Court added a second layer of prophylaxis to the *Miranda* rule, holding that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication."

A person is considered "in custody" for the purposes of *Miranda* and *Edwards* if the individual "has been deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, or his freedom of action has been curtailed to a "degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983). Thus, "[t]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *United*

States v. Robertson, 19 F.3d 1318, 1321 (10th Cir. 1994).

Here, prior to his written consent to search his vehicle and subsequent custodial statements, Mr. Paetsch had been forcibly removed from his vehicle at gun point, handcuffed, and placed on the street curb under the careful watch of armed law enforcement agents. A reasonable person in Mr. Paetsch's shoes would not have felt that he was free to leave. Furthermore, after being asked for his consent to search his vehicle, Mr. Paetsch unequivocally refused and stated, "I want to speak with my lawyer." Despite this unequivocal *Edwards* request to speak with his lawyer prior to any further interaction with law enforcement, Mr. Paetsch was moved from the street curb to the back of a police cruiser and once again asked for his consent to search his vehicle. Mr. Paetsch refused once again. Not taking no for an answer, officers' continued to pressure Mr. Paetsch while in custody, handcuffed, and in the back of a police cruiser. Eventually, Mr. Paetsch acquiesced to the continued pressure being applied by law enforcement and signed a "voluntary" written consent to search his vehicle. Additionally, Mr. Paetsch was questioned by law enforcement as to the contents of the vehicle – in particularly whether or not there were firearms located within his vehicle. In response, Mr. Paetsch indicated that there were two loaded guns in his vehicle.

FBI Agent Thrapp was on scene and was immediately informed that Mr. Paetsch had executed a written consent to search his vehicle. At that very moment, Agent Thrapp was also informed by Sergeant Braunlich as to the circumstances underlying the continued attempts to obtain a valid waiver to search the vehicle, including the fact that Mr. Paetsch had unequivocally requested counsel when first asked to provide consent. Based on this information, Agent Thrapp decided that the written consent to search was invalid and did not proceed upon this legal basis to

justify the ultimate search of the vehicle.

Mr. Paetsch was forcibly seized and arrested at gunpoint, placed in handcuffs, and ultimately secured in the back of a police cruiser. No reasonable man would believe at that point that he was free to leave and, thus, Mr. Paetsch was in custody for purposes of *Miranda* and *Edwards*. While not in response, or subsequent to, his being read the *Miranda* rights[1], Mr. Paetsch, nonetheless, clearly and unequivocally requested that he be allowed to speak with a lawyer prior to any further interaction with law enforcement. Accordingly, the continued questioning and pressure exerted by law enforcement subsequent to his unequivocal request, and prior to being given access to an attorney, is in violation of his 5th Amendment rights, as explained by *Miranda* and *Edwards*, and must be suppressed.

III. CONCLUSION

Because the illegal arrest and warrantless search of Mr. Paetsch's car cannot be justified, all evidence obtained as a result of that search must be suppressed. Further, all statements, including but not limited to Mr. Paetsch's statements with respect to the search and the firearms were taken after the unjustified warrantless seizure and arrest and therefore, directly derived from the illegal arrest. Because there was no intervening event to sufficiently purge the taint, these statements must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975). In addition to the many 4th Amendment violations, Mr. Paetsch's consent to search, as well as his custodial statements, were obtained subsequent to his

[1] From the discovery provided thus far, it does not appear that Mr. Paetsch was read his *Miranda* rights prior to the consent to search his vehicle or the questioning by law enforcement concerning the contents of his vehicle.

unequivocal *Edwards* request for counsel and, therefore, must be suppressed on these grounds as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 12-cr-00258-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN PAETSCH,

Defendant.

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

Plaintiff, United States of America (hereinafter "the government"), by United States Attorney, John F. Walsh, and through the undersigned Assistant United States Attorney, David M. Conner, hereby responds in opposition to defendant Christian Paetsch's Motion to Suppress Evidence and Statements (hereinafter "Motion") as follows:

FACTS

On June 1, 2012, Christian Paetsch and his wife, Caroline, met with Erica Steale at Wells Fargo Bank at 15301 E. Hampden Avenue, in Aurora, Colorado, to get loan terms re-written. When Ms. Seale turned down the Paetsch's loan request, Caroline became upset and stormed out of the bank.

The next day, on June 2, 2012, at around 3:45 p.m., Paetsch returned to the same Wells Fargo Bank. This time, however, he was wearing a dark hoodie, gloves, a mask, and sunglasses. Although witnesses could not observe his face, they described him as being short (about 5'7" tall) and sounding Caucasian.

After walking into the bank, Paetsch used an air horn to get everyone's attention and pointed a dark handgun at the three bank tellers behind the counter. Ms. Seale was also behind the counter. There were a total of 6 employees and 6 customers in the bank at that time. Paetsch ordered the tellers to open their "top and bottom" money drawers. He then ordered everyone to lie on the ground while he quickly grabbed handfuls of money, and placed the money in his front jacket pocket.[1] Unbeknownst to Paetsch, however, a global position satellite tracking device was embedded in a "bait pack" of money which he took. Once the GPS device was removed from its magnetic holder, it sent a signal to police via a cellphone sim card, which was also embedded in the money. The police were then able to follow the GPS on a computer screen in "real time." The signal from the device began at 3:49 p.m.

The GPS is able to show the location of a bait pack within an approximate thirty-foot radius, depending upon the accuracy of any map on which the signal is superimposed. In order to narrow that range, police must use a hand-held tracking device which emits a light signal that grows stronger as it gets closer to the target. The tracking

[1]These witness remained traumatized from this experience even after Paetsch was long gone, and they were being interviewed.

device can effectively pinpoint the GPS, to a specific location inside a 30-foot radius.

Aurora police dispatch tracked the GPS signal for approximately 15 minutes. Initially, Paetsch appeared to be moving slowly and stopped at a vacant house at 15779 E. Greenwood Drive. The evidence indicates that Paetsch, the lone, armed, bank robber, rode away from the bank on a bicycle and then switched to a car at the Greenwood Drive location. Paetsch was tracked, using the GPS signal, to the intersection of E. Iliff Avenue and Buckley Road. The GPS indicated that he was stopped, presumably at a red light. Noting that they were encountering heavy, stop and go, traffic, police became concerned with the possibility that Paetsch would eventually notice that he was being followed and try to outrun them, or figure out that the currency he had stolen contained a GPS device and try to discard it. These things had occurred in the past in other bank robbery investigations in which the robber took a GPS tracking device. Additionally, the life of the battery in the GPS was finite. Since the GPS indicated that the car was stopped, police officers made the decision to block eastbound traffic at that intersection at approximately 4:01 p.m.

After blocking the road and effectively stopping nineteen cars heading eastbound, police officers waited for Rocky Mountain Safe Streets Task Force Investigator Thomas Acierno to bring the hand-held tracking device to the scene. Investigator Acierno's arrival was delayed by approximately 55 minutes, however, due to the fact that he had to bring the device from his office on the west side of the Denver metro area and then drive

to the Iliff and Buckley intersection.[2] In the meantime, motorists were asked to remain in their vehicles and keep their hands visible. They were allowed to use their cellular telephones as long as their hands were in view.

Police officers manuevered themselves behind their patrol cars in order to remain safe. They also had their firearms drawn but, pursuant to police training, did not actively point their weapons at any given motorist. Traffic was diverted away from the scene. Police officers were also having to discourage spectators who were amassing at the scene from attempting to enter the barricaded area to take photographs on mobile devices. Crowd control was conducted to provide for officer and civilian safety and for evidence integrity reasons. Given the fact that officers were investigating an armed bank robbery occurring minutes before the stop, crowd control efforts were minimal and reasonable.

Upon his arrival at 4:55 p.m., Investigator Acierno began scanning for the GPS device. Within a few minutes, Investigator Acierno received a signal at the white Ford Expedition SUV, the vehicle Paetsch was driving. He also received a signal from a driver whose car was parked next to the Ford. Despite the signals, however, Investigator Acierno continued scanning. While he did so, one of the police officers advised him of having observed a purple-colored $2,000 bank money band lying on the passenger seat of the Ford. Investigator Acierno again scanned the Ford and got a signal. He too observed

[2]At the time, there was only one hand-held tracking device that police officers were aware of, and it was located at the Rocky Mountain Safe Streets Task Force at 4701 Marion Street, Denver, Colorado.

the cash strap from the Ford's window.

Because Investigator Acierno was not overly confident about the results of the tracking device, Aurora police officers systematically asked each of the motorists and their passengers to exit their vehicles. The motorists were asked for their identification and then led to a sidewalk nearby. Some of the motorists who matched the description of the robber were handcuffed because police were aware that the robber was carrying a gun. None of the motorists were under arrest. Children remained with their parents or were released to family members or friends who were called to the scene. The motorists were asked if they would provide written consent to search their vehicles. All but Paetsch agreed. Paetsch not only declined, but said he wanted to talk to a lawyer.

At 5:09 p.m., police officers received a call from another investigator at the bank that the robber was definitely male and most likely white. Meanwhile, news of the observation of the bank money band in the Ford and the signal alert began to circulate among the other police officers. The officers also observed some mesh material that matched the description of the robber's maskin Paetsch's vehicle. Sergeant Kenneth Braunlich consequently asked Paetsch if he would consent to a search of his car. Sergeant Braunlich had no knowledge of Paetsch's earlier statement concerning an attorney. Paetsch agreed and signed a written consent form. After determining Paetsch's vehicle would be searched, Sergeant Braunlich asked Paetsch if he had any weapons inside his vehicle. Paetsch replied in the affirmative, stating that he had "a Glock and a

Walther inside the Ford." Paetsch was subsequently removed from the area where the other motorists were waiting and taken to a patrol car, which was parked in the middle of Iliff between east and westbound traffic. After speaking to another police officer, however, Sergeant Braunlich learned of Paetsch's earlier statement about an attorney and opted not to rely on Paetsch's consent as grounds for the search. Paetsch's removal to the patrol vehicle occurred at 5:28 p.m.

Despite having probable cause to search Paetsch's vehicle by this time, Investigator Acierno asked his colleague, Task Force Investigator Pat Williams, to come to the scene and conduct another scan. Investigator Williams had more experience using the device. Investigator Williams, who was conducting interviews at the Wells Fargo Bank, arrived at the scene about 20 minutes later. He too used the hand-held device and got a strong signal at the Ford, the vehicle in which Paetsch was the sole occupant. Investigator Williams also observed the money band in the passenger seat of the car. Police officers nevertheless waited until the other vehicles had left the scene before conducting a search of Paetsch's car. The time from the inception of the roadblock to probable cause for Paetsch's arrest was just under an hour and 30 minutes.

During the search of Paetsch's car, police officers found the clothing Paetsch wore to rob the bank and $22,956.00 in U.S. currency in a grey "box style" bag that had the words "Cherry Creek High School" inscribed on it in the front floorboard, on the passenger side of the vehicle. Police also discovered two handguns, one within reach in

the front of the vehicle and one in back. Each of the guns contained a fully loaded magazine. Finally, the police discovered the GPS within a stack of bills.

On June 5, 2012, the federal grand jury handed down a two-count indictment, charging Paetsch with armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and using a firearm during the commission of a robbery, in violation of 18 U.S.C. § 924(c).

ARGUMENT

Paetsch argues that the traffic stop was not supported by reasonable suspicion and that his arrest was not supported by probable cause. He therefore contends that all physical evidence seized from his car and his statements given at the scene must be suppressed.[3] As the facts and law establish, however, Paetsch's argument is without merit.

1. The Roadblock Had a Proper Purpose and Was Implemented Reasonably.

While it is generally true that police are barred from undertaking a search or seizure absent individualized suspicion, seizures conducted without grounds for suspicion of particular individuals have been upheld in "certain limited circumstances." *See Treasury Employees v. Von Raab,* 489 U.S. 656, 668 (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint,

[3]Since this motion is brought under Fed.R.Crim.P. 41(b), if suppression is granted, Paetsch can move for the return of all of the contents of the seized property in the vehicle under Fed.R.Crim.P. 41(g).

United States v. Martinez–Fuerte, 428 U.S. 543, 545–550, 566–567 (1976), or at a sobriety checkpoint, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447, 455, (1990), and administrative inspections in "closely regulated" businesses, *New York v. Burger,* 482 U.S. 691, 703–704 (1987). Accordingly, the absence of an individualized suspicion in the police roadblock context is not dispositive of constitutionality. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, (1999); *Martinez-Fuerte*, 428 U.S. at 561. Indeed, the Supreme Court has noted that "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (citing *New York v. Class,* 475 U.S. 106, 112-113 (1986); *Martinez-Fuerte,* 428 U.S. at 561. Therefore, roadblocks designed to address specialized law enforcement purposes are permissible without the presence of individualized suspicion, provided the Court finds a favorable balance between "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50-51 (1979); *see also Lidster*, 540 U.S. at 424 (quoting *Brown*).

Here, the roadblock was a targeted law enforcement effort designed to address a specific and dangerous crime – an armed bank robbery and an extremely dangerous person, an armed bank robber. Because the money stolen during the bank robbery contained a GPS tracking device, police officers were able to narrow their attention to a relatively small area in which there was a high likelihood of catching an armed criminal

fleeing from the commission of the crime. Thus, the police roadblock was properly tailored to detect evidence of a particular criminal wrongdoing rather than for general crime control. *See Lidster*, 540 U.S. at 424. Accordingly, the roadblock was not unconstitutional per se. *See City of Indianopolis v. Edmond*, 531 U.S. 32, 44 (2000) (noting that "an appropriately tailored roadblock set up to . . . catch a dangerous criminal who is likely to flee by way of a particular route" would "almost certainly" be permissible); *United States v. Abbott*, 265 F.App'x 307, 309 (5th Cir. 2008).

In this case, Paetsch not only brandished a firearm at twelve of the bank's customers and employees, but also removed a substantial amount of money from the bank. The public concern of capturing such a violent criminal was therefore substantial. And, the roadblock was a discretionary police tactic specifically tailored in both time and place to further the public interest in apprehension. Moreover, any interference with subjective liberties the roadblock may have caused individual citizens was outweighed by Paetsch's apprehension.[4] As police at the scene of Buckley and Iliff on that Saturday afternoon were keenly aware, a bank robber who points a gun at innocent bank employees and customers may also be inclined to use the gun when cornered or desperate, in an effort to avoid apprehension. Furthermore, as has been the case in similar situations, Paetsch may have tried to outrun the police which, on a Saturday afternoon, would have been extremely dangerous to other motorists – not to mention, the residents – and their

[4]Recognizing the importance of Paetsch's apprehension, only two motorists have filed formal complaints about their detention.

children -- of the neighboring areas around Iliff and Buckley. Paetsch's assertion that the officers should have continued monitoring the GPS tracker until Paetsch was identified or the number of individuals seized during a traffic stop was limited is consequently unrealistic, given the possibility of the detection and destruction of the GPS, as well as the extremely plausible risk of a high speed chase, and other negative scenarios. *See, e.g., United States v. Gurule*, 461 F.3d 1238, 1240-41 (10th Cir. 2006) (following high speed chase which ended when defendant crashed into a parked vehicle, defendant abducted a woman from her home and forced her drive him to another location at knife-point); *United States v. White*, 551 F.3d 381, 382 (6th Cir. 2008) (armed bank robber led police on a lengthy high-speed chase that included shots fired from the car at pursuing officers); *United States v. Alexander,* 48 F.3d 1477, 1493 (9th Cir.1995) (following bank robbery, defendants fled in a van, shot at police officers in pursuit, and engaged in a chase at speeds up to 110 miles per hour endangering other motorists); *United States v. Swoape,* 31 F.3d 482, 483 (7th Cir.1994) (following bank robbery, defendant shot at an officer, engaged the police in a high speed chase through a populated area, and instigated a shootout in a McDonald's parking lot). Indeed, for police officers to have continued following Paetsch, as he suggests was the better alternative, would have demonstrated a lack of judgment on their part had a detrimental outcome occurred. In short, given the balancing that the Court must apply to evaluate the reasonabless of the police officers' decision to employ the roadblock, the police action was appropriate and, more

importantly, constitutional.

Courts have consistently upheld the constitutionality of roadblocks in the presence of similar dangerous or exigent circumstances, such as the need to protect the community from the danger of individuals fleeing from law enforcement officials or otherwise attempting to avoid arrest. *See, e.g., Abbott*, 265 F.App'x at 309 (roadblock following armed bank robbery); *Seekamp v. Michaud*, 109 F.3d 802, 807 (1st Cir. 1997) (roadblock set up to apprehend fleeing felon); *United States v. Harper*, 617 F.2d 35, 40-41 (4th Cir. 1980) (roadblock after police discovered large-scale smuggling operation with numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape); *United States v. Davis*, 143 F.Supp.2d 1302, 1305-06 (M.D. Ala. 2001) (roadblock to arrest recently indicted individuals); *United States v. Kuntz*, 265 F. Supp. 543, 548 (N.D.N.Y. 1967) (roadblock after an armed robbery where general descriptions of the suspects had been broadcast to area officials). The Tenth Circuit has also held that suspects fleeing the scene of an armed robbery present exigent circumstances calling for action. *See United States v. Miller,* 532 F.2d 1335, 1338 (10th Cir.1976). In light of the exigent and dangerous circumstances present in this case, the roadblock was a reasonable alternative to risking the safety and welfare of police officers and the public. Furthermore, the evidence will establish that the police officers were diligently attempting to minimize any interference with individual liberties. When it became apparent that Investigator Acierno was not initially confident in the results of the

handheld tracking device, police officers pursued other alternatives such as separating motorists from their vehicles and asking them for consent to search. The law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. *Lidster*, 540 U.S. at 425. Due to circumstances beyond their control, police officers were aware that the roadblock was lasting longer than anyone anticipated and were consequently taking steps to reduce the intrusion. Given the fact that the GPS signal remained stopped at the scene, police officers were certain that one of the vehicles contained the GPS device, and reasonably certain it contained the bait bills from the robbery. With an armed robbery suspect within close proximity, releasing all of the motorists due to the duration of the roadblock was not in the interests of public safety. Thus, on balance, the roadblock here satisfied the requirements of the *Brown* test.

2. Paetsch's Detention During the Roadblock Did Not Constitute an Arrest.

Contrary to Paetsch's assertion otherwise, he and the other motorists were not arrested when they were separated from their vehicles.[5] In making this assertion, Paetsch not only trivializes the exigency of the situation, but also exaggerates the individual circumstances of the other motorists. While he complains that police threatened "dozens of individuals' lives" . . . "based solely on the GPS tracking signal," he ignores the fact

[5]The defense attempts to characterize the initial stopping of the vehicles at the roadblock as a mass arrest. Here, the labels placed on each of the officer's and the defendant's actions at this juncture matter a great deal. Courts have long recognized the distinctions between the concepts of a stop, seizure, custody, arrest, reasonable suspicion and probable cause. *See, e.g., Cortez v. McCauley*, 478 F.3d 1008, 1115-16 (10th Cir. 2007).

that he himself had just put a dozen lives in jeopardy when he pointed a loaded firearm at them and ordered them get to the ground. In short, the defense wants to separate the violent armed bank robbery, a short distance away and moments before the stop, from the Court's analysis. Paetsch should not be permitted to do so.

Furthermore, although all of the motorists were removed from their vehicles, only a few were handcuffed because they fit the description of the robber. When a citizen complained about the tightness of the handcuffs, the handcuffs were immediately loosened. Moreover, as soon as police concluded that they had probable cause to arrest Paetsch and search his vehicle (within approximately 30 minutes after removal), all of the other motorists were released from detention.

When evaluating an investigative detention's reasonableness, this Court must determine: (1) whether the detention was "'justified at its inception,'" and (2) whether the officer's actions "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Johnson,* 364 F.3d 1185, 1189 (10th Cir.2004) (quoting *Terry v. Ohio,* 392 U.S. 1, 20 (1968)). "At both stages, the reasonableness of the officer's suspicions is judged by an objective standard taking the totality of the circumstances and information available to the officers into account." *Id.* (internal quotation marks omitted). In addition, the Supreme Court has held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," *Florida v. Royer,* 460 U.S. 491, 500 (1983), and that

police must "diligently pursue their investigation," *United States v. Place,* 462 U.S. 696, 709 (1983). In this connection, the Supreme Court has "impose[d] no rigid time limitation" on investigative detentions, preferring instead to let "common sense and ordinary human experience ... govern over rigid criteria." *United States v. Sharpe,* 470 U.S. 675, 685 (1985). Furthermore, the Tenth Circuit has stated that "[s]ince police officers should not be required to take unnecessary risks in performing their duties, they are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a Terry] stop.'" *United States v. Shareef*, 100 F.3d 1491, 1502 (10th Cir. 1996) (quoting *United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993)). Therefore, "the use of firearms, handcuffs, and other forceful techniques does not necessarily transform a *Terry* detention into a full custodial arrest – for which probable cause is required – when the circumstances reasonably warrant such measures." *Id.* (quoting *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994) (internal quotation marks omitted)). *See also United States v. Albert*, 579 F.3d 1188, 1194-95 (10th Cir. 2009) (collecting cases). In *Shareef*, the Tenth Circuit rejected the district court's conclusion that the defendants' forcible removal from their vehicles at gun point, pat-down, handcuffing, and order to kneel on the pavement transformed a stop into an arrest where the officers had received information that led them to believe that one of the defendants was armed and dangerous. *Id.* at 1502-03. Likewise, in *United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011), the Seventh Circuit

ruled that it was reasonable for officers conducting a search for drugs to place the defendant in handcuffs and in the squad car for their safety while they pursued their investigation. *Id.* at 1016. Here too, police officers had information that one of the motorists was armed and dangerous. Thus, they took reasonable measures for their own safety, as well as the safety of others, to minimize any danger by handcuffing those motorists who fit the description of the robber. As established above, it is clear that the detention was justified at its inception and the officers' actions were reasonably related in scope to the circumstances which justified the interference in the first place. Police were attempting to apprehend an armed robber who had just brandished a gun at twelve innocent individuals and had an evidentiary basis to believe he was among the detained motorists. Such information justifies a high-risk stop. In *United States v. Tilmon*, 19 F.3d 1221 (7th Cir.1994), for example, a lone bank robber described as armed and dangerous fled in a distinctive car. Two hours after the robbery and 50 miles distant, officers noticed a matching car driven by a man matching the general description of the robber (young black male, 5'10", 160 lbs.). About five police cars stopped the car on the highway, ordered the suspect out of his car at gunpoint, and handcuffed him while holding a shotgun to his head. The Seventh Circuit held that this full felony stop had not exceeded the bounds of *Terry*. *Id.* at 1226. As the Seventh Circuit observed,

> When effecting a *Terry* stop, which is always a stop made at "close range," police officers must make a quick decision about how to protect themselves and others from possible danger. They are not necessarily required to adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.

> A court in its assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.

Tilmon, 19 F.3d at 1225.

Although Paetsch's detention was not as brief as officers had hoped when some of the eastbound traffic on Iliff was stopped, it was nevertheless reasonable and justified under the circumstances. The delay was mainly caused by the wait for the hand-held tracking device. While they were waiting, however, police officers were acting diligently in trying to contain the scene and secure the safety of themselves and others. Also, the police officer in charge of the operation was in frequent contact with dispatch in an effort to ascertain the whereabouts of Investigator Acierno and express the importance of the swiftness of his arrival. As a form of reference, the delay caused by waiting for the tracking device is much like delays caused by waiting for drug sniffing dogs, and even longer detentions have been upheld in such situations. *See, e.g., United States v. Maltais* 403 F.3d 550, 557-58 (8th Cir.2005) (finding wait of approximately 2 hours and 30 minutes for a canine to arrive in remote location reasonable); *United States v. Frost,* 999 F.2d 737, 741-42 (3d Cir. 1993) (finding that wait of almost one hour for a drug dog was reasonable); *United States v. White,* 42 F.3d 457, 460 (8th Cir.1994) (holding 80 minute detention awaiting arrival of drug dog reasonable where delay due to remote location); *United States v. Hardy,* 855 F.2d 753, 761 (11th Cir.1988) (holding approximately 50 minute detention awaiting arrival of nearest canine unit valid investigative stop); *United*

States v. Hbaiu, 202 F.Supp.2d 1177, 1183 (D. Kan. 2002) (detention lasting one hour and 45 minutes not unreasonable). *Cf. United States v. Place,* 462 U.S. 696, 709 (1983) (ninety-minute detention of luggage while police arranged for dog sniff was unreasonable where police did not diligently pursue investigation). With the exception of *Hbaiu,* wherein the defendant gave consent to search but could not find his key, each of the above-referenced cases involved a refusal to consent. Furthermore, they involved drug trafficking which is less exigent and dangerous than armed bank robbery.

Paetsch's detention was converted into an arrest only when he was placed in the back of the patrol car. By that time, however, police officers, through their collective and imputed knowledge, had probable cause to conclude that he was the bank robber and his vehicle contained evidence of his armed bank robbery. While it is true that Investigator Acierno continued to scan the other vehicles with the hand-held device because he was not confident with the strength of the signals he was getting from Paetsch's car, Investigator's Acierno's subjective belief concerning probable cause is not dispositive. According to the Tenth Circuit, "[t]hat an officer did not believe probable cause existed to detain a suspect does not preclude the Government from justifying the suspect's detention by establishing probable cause." *United States v. Santana-Garcia*, 264 F.3d 1188, 1192 (10th Cir. 2001) (citing *Florida v. Royer*, 460 U.S. 491, 507 (1983)). *See also United States v. Treto-Haro*, 287 F.3d 1000, 1006 (10th Cir. 2002).[6] Furthermore, even

[6]The same principle applies with respect to a police officer's subjective belief as to whether there is probable cause to search. *See, e.g., United States v. Davis*, 197 F.3d 1048, 1051

assuming *arguendo* that Paetsch's arrest was somewhat premature, it was inevitable. *See United States v. Manuel*, 706 F.2d 908, 911 (9th Cir. 1983) (premature arrest of murder defendant upheld where probable cause for arrest was well established before officers began their interrogation).

3. The Search of Paetsch's Vehicle Was Based on Probable Cause Rather Than His Consent.

Paetsch should get no mileage from the argument that Sergeant Braunlich allegedly coerced him into giving consent to search his Ford after he had initially refused to provide consent and told police officers he wanted to speak to his attorney. Sergeant Braunlich did not pressure Paetsch into signing a consent form. Nevertheless, when Sergeant Braunlich learned of Paetsch's request for an attorney from one of the other officers, he did not act on Paetsch's consent to search the vehicle. Accordingly, Paetsch's consent led to nothing.

"Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence." *United States v. Benard,* 680 F.3d 1206, 1210 (10th Cir. 2012) (quoting *United States v. Chavez*, 534 F.3d 1338, 1344 (10th Cir. 2008)). Here, by the time police officers searched Paetsch's vehicle, they had probable cause to believe it contained evidence of

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(10th Cir. 1999) ("Probable cause is measured against an objective standard"; hence, "[t]he subjective belief of an individual officer as to whether there is probable cause ... is not dispositive.") (internal quotation marks omitted).

his armed bank robbery based on the positive signals from the hand-held tracking device and police observations of a $2,000 money band and the mesh material used in Paetsch's mask, in plain view. *Cf. United States v. Vazquez*, 555 F.3d 923, 929-30 (10th Cir. 2009) (warrantless automobile search valid where police had probable cause after drug-detection dog alerted at front and rear bumpers of vehicle). While the Fourth Amendment generally requires that a search be made pursuant to a warrant to be considered reasonable, the ongoing exigent circumstance that the car might drive away has led the Supreme Court to conclude that a warrant is not required to search a vehicle. *See Maryland v. Dyson,* 527 U.S. 465, 466–67 (1999) ("[W]here there [is] probable cause to search a vehicle[,] a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.") (citing *United States v. Ross,* 456 U.S. 798, 809 (1982)) (internal quotes omitted); *California v. Carney,* 471 U.S. 386, 393–94 (1985). This rule of law is aptly referred to as the "automobile exception" to the warrant requirement, *see Maryland v. Dyson,* 527 U.S. at 466–67, and has been settled precedent since 1925. *See Carroll v. United States*, 267 U.S. 132, 160-62 (1925). Thus, "[u]nder the automobile exception to the warrant requirement, police officers may stop and search a car if they have probable cause to believe it contains contraband, regardless of whether a traffic violation has occurred or a search warrant has been obtained." *See Benard,* 680 F.3d at 1210.

4. Sergeant Braunlich's Pre-*Miranda* Query About Firearms Was Permissible Under the Public Safety Exception.

Paetsch asserts that any statements he made to police are inadmissible as fruits of an unlawful arrest and should therefore be suppressed. The only statements that Paetsch made, however, were in response to Sergeant Braunlich's inquiry about whether he had weapons in his car. In *New York v. Quarles,* 467 U.S. 649 (1984), the Supreme Court ruled that an exception to the *Miranda* rule exists where a threat to the public could be alleviated by unwarned questioning, and that responses to unwarned questions asked under such circumstances may be admissible in evidence. The Tenth Circuit has applied this "public safety exception" when a police officer's inquiry relates to an objectively reasonable need to protect the police or the public from immediate danger associated with a firearm. *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009). Although Paetsch was handcuffed at the time he made the statement about having firearms in the car, this has not been found to negate the public safety exception, as there remains the possibility that someone else can access the weapon and inflict harm with it. *Id.* at 1201. *See also United States v. Lackey*, 334 F.3d 1224, 1226-28 (10th Cir. 2003).

Even if Paetch's statements about the firearms amounted to a *Miranda* violation, however, police would have found the firearms anyway during the subsequent search of the automobile. Therefore, discovery of the firearms was inevitable. *See, e.g., United States v. Torres-Castro*, 470 F.3d 992, 1000-01 (10th Cir. 2006) (search of residence for shotgun would have occurred regardless of protective sweep, and thus shotgun and shells did not need to be suppressed); *Shareef*, 100 F.3d at 1508 (suppression of evidence

reversed where "vehicles would have been impounded and search as a result of a lawful investigation that was underway before any of the defendants was illegally seized").

5. The Plain View Doctrine Applies To The Observation of the Mesh Material and the Money Band in the Car.

The "plain view" doctrine allows a law enforcement officer to seize evidence of a crime, without violating the Fourth Amendment, if "(1) the officer was lawfully in a position from which the object seized was in plain view, (2) the object's incriminating character was immediately apparent (i.e., there was probable cause to believe it was contraband or evidence of a crime), and (3) the officer had a lawful right of access to the object." *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir.2006) (quoting *United States v. Thomas,* 372 F.3d 1173, 1178 (10th Cir.2004)). Here, the officers were on a public street when they plainly observed the $2000 money band and the mesh material through the window of Paetsch's car. Officers recognized the incriminating character of the money band immediately, having knowledge of commission of the bank robbery. While Paetsch asserts that his windows were heavily tinted, thereby implying that officers were lying about seeing the money band, crime scene photographs of the windows of Paetsch's vehicle clearly show the spectators lined up across the street. These photographs were taken from the rear of the vehicle; thus, the spectators were plainly visible through **two** windows - the rear and the front. It is therefore reasonable to assume that the officers observed the money band as they reported.

CONCLUSION

The roadblock was a reasonable law enforcement decision under the circumstances of this case. Paetsch's subsequent detention and arrest served a legitimate law enforcement function of apprehending a dangerous, armed criminal. Based on the foregoing facts and law, Paetsch's Motion to Suppress Evidence and Statements should be denied. The government recognizes that an evidentiary hearing (likely an extensive evidentiary hearing) must be held and therefore believes that the trial date should be vacated during the pendency of the suppression litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2012 I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Matthew C. Belcher
E-mail: Matthew_Belcher@fd.org

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner (mail, hand deliver, etc.) indicated by the non-participant's name:

None

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Criminal Action No. 12-cr-00258-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN PAETSCH,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO SUPPRESS

In this action, Defendant Christian Paetsch is charged in Count 1 of the Indictment with bank robbery, and use of a dangerous weapon in the commission of a bank robbery, in violation of 18 U.S.C. § 2113(a) & (d), respectively; and in Count 2 with use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). (ECF No. 6.)

This matter is before the Court on Defendant's Motion to Suppress Evidence and Statements ("Motion" or "Motion to Suppress"). (ECF No. 16.) In the Motion, Defendant seeks suppression of all evidence obtained during the course of a traffic stop shortly following the bank robbery. (*Id.*) The Government has filed a Response to the Motion (ECF No. 18), and Defendant has filed a Reply (ECF No. 19).

Over the course of three days, the Court held an evidentiary hearing on the Motion. (ECF No. 26-28.) Both parties were (well) represented at the hearing by counsel, and were given a full opportunity to present witness testimony. (*See also* ECF

No. 22.) All told, sixteen witnesses testified over the course of the three-day hearing: a teller at the bank that was robbed, thirteen police officers involved in the traffic stop, and two civilians stopped in the traffic stop. Defendant did not testify. The Court also held oral argument on the Motion to Suppress at the close of evidence.

After carefully considering the evidence presented at the hearing, counsel's arguments in their briefs and at the hearing, and the applicable law, the Court GRANTS IN PART and DENIES IN PART the Motion to Suppress.

I. BACKGROUND

The underlying material facts are undisputed. Specifically, the testimony provided by all of the various witnesses at the evidentiary hearing – both the Government's witnesses and Defendant's witnesses, and their testimony both on direct and cross examination – was consistent regarding the material facts. The Court finds that the testimony of all of the witnesses was generally credible, both because there were few inconsistencies in their testimony,[1] and because of the witnesses' demeanor during their testimony. *See United States v. DeJear*, 552 F.3d 1196, 1200 (10th Cir. 2009) (at a suppression hearing, "[t]he credibility of witnesses, the weight accorded to evidence, and the reasonable inferences drawn therefrom fall within the province of the district court"). The key question is, given the undisputed material facts, were the police

[1] That makes this case different from a case in which the testimony of two or more witnesses directly conflict regarding crucial facts, in which case the lack of credibility of one or more witnesses is clearer, and credibility determinations can be of the utmost importance.

Notably, Defendant's counsel, in his cross-examination of the police officers at the hearing, did not appear to attempt to impeach the officers' credibility, but instead simply sought to elicit what counsel believed to be the facts favorable to Defendant's case, for example, facts regarding the invasiveness and duration of the traffic stop.

officers' actions reasonable under the governing case law. The evidence presented at the hearing, and accepted as true by the Court, indicates the following:

At approximately 3:47 p.m. on June 2, 2012 (a Saturday), the Wells Fargo Bank branch located at the corner of South Chambers Road and East Hampden Avenue in Aurora, Colorado was robbed. The robber entered the bank, holding a handgun in one hand and an air horn in the other, and yelled for everyone to get down on the floor.[2] The robber was covered "head-to-toe" in clothing, including his face and hands. The robber scooped stacks of money out of the tellers' drawers, and left the bank. The evidence suggests the robber left the area either on foot or on a bicycle.

Presumably unbeknownst to the robber, a global positioning system ("GPS") tracking device was embedded in one of the stolen stacks of money. The system was set up such that shortly after the GPS tracking device was removed from the teller's drawer, it sent a signal via satellite to the Aurora Police Department ("APD"), where it could be tracked on a map on an APD computer monitor.[3] The location of the GPS tracking device, as shown on the APD computer monitor, was accurate to within an approximate 30-foot radius. Based on the location of the GPS tracking device, APD dispatchers began relaying the tracking device's location via radio to police officers in the field, along with other updates. Dispatchers also began compiling an Incident Recall

[2] There were six or seven bank tellers in the bank at the time, as well as an unknown number of customers.

[3] Every 6-10 seconds the GPS tracking device sent a "ping" off the satellite, which would mark a dot on the map on the APD's computer monitor. (Thus, how far apart the dots were on the map indicated the approximate speed that the device was moving.) Also, the dots showing up on the computer screen were only delayed approximately 5-13 seconds behind the live location of the tracking device.

Log ("IRL") of these updates, which could be viewed by officers on screens in their patrol cars.

At 3:50 p.m., the first update was broadcast to officers regarding the tracking device's location. Between 3:52 p.m. and 3:55 p.m., the tracking device appeared to be stopped at a residence on Greenwood Drive in Aurora, approximately a half-mile from the bank. At 3:55 p.m., the tracking device began moving again, away from that residence. The Court questioned Detective Michael Thrapp at the hearing regarding why officers did not intercept the robber when he was stopped on Greenwood Drive. Detective Thrapp credibly responded that it was simply impossible for officers to get to that location in time, given how dispersed officers generally are within Aurora, how recently the robbery had occurred, and that the tracking device was stationary for only three minutes.

A couple of asides are necessary to point out. First, officers had only a very vague description of the robber of the bank, such that they did not even definitively know if the robber was male. Immediately following the robbery, Kathleen Smith, a teller at the bank, telephoned 9-1-1 and could only report that, based only on the sound of the robber's voice, she thought the robber was male, and provided best estimates that the robber was Caucasian and in his 20s or 30s. Second, officers were on notice that devices called handheld "beacons" existed that could be brought to a particular scene to much more accurately identify the precise location of a GPS tracking device embedded in a stack of stolen money, to within approximately five feet. Early in the APD's monitoring of the tracking device's location, dispatchers were reporting to officers that at least one such handheld beacon was available in the Denver metropolitan area.

After the tracking device began moving again, police dispatchers began reporting that the tracking device was now moving at speeds of 30-40 miles per hour, indicating that the tracking device was now inside an automobile.[4] Dispatchers reported that the tracking device was traveling northbound on Chambers Road towards East Iliff Avenue, and that the tracking device then turned right onto Iliff Avenue, traveling eastbound towards the next major intersection of Iliff and Buckley Road.

As the tracking device moved eastbound on Iliff Avenue, APD Officer Kristopher McDowell was traveling westbound on Iliff, hearing dispatch reports that the tracking device was coming towards him, and then that the tracking device had passed his location. Officer McDowell took a u-turn and began following the signal. McDowell then heard from dispatch that the signal was stopped at the corner of Iliff Avenue and Buckley Road. He approached the intersection, saw a group of vehicles stopped at the intersection at a red light, and heard another dispatch that the signal was still stopped at the corner. McDowell noticed that the light was about to turn green, and had only a second or two within which to decide whether or not to stop traffic at that intersection at that time. At 4:01 p.m., approximately 14 minutes after the bank robbery, Officer McDowell pulled his patrol car around and in front of the group of twenty vehicles stopped at the red light, got out of his patrol car, and motioned with his hands for the vehicles to remain stopped. Again, at that time, officers had no information regarding which of the twenty vehicles belonged to the bank robber, and also had little information regarding what the robber looked like.

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[4] This information alone, obviously, gave officers no indication regarding what type of vehicle was carrying the GPS tracking device.

Within a very short period of time, other patrol cars from the Aurora, Colorado Police Department arrived on the scene, physically blocking the twenty civilian vehicles within the perimeter formed by their patrol cars. At this time a large number of bystanders began to gather in front of commercial establishments adjacent or very near to the intersection in question to watch the events unfold. Over a public address ("PA") system, individuals in the twenty vehicles were ordered to put their hands up (and out of their car windows if possible), and not to move.[5] Evidence indicates that approximately twenty-nine people were within the twenty stopped vehicles. Officers had their weapons pointed toward the group of twenty vehicles, and no one within the twenty vehicles was free to leave. Further reports from dispatch indicated that the tracking device was still stationary at the corner of Iliff Avenue and Buckley Road.[6]

At 4:08 p.m., APD Lieutenant Christen Lertch arrived on the scene, and became the commanding officer from that point forward. Lieutenant Lertch testified that officers were faced with a unique situation, because in other similar cases, officers typically had more information regarding the suspect's vehicle or physical appearance. Lertch testified that the threat posed by a dangerous, armed criminal being anywhere within

[5] They were not told why they were being stopped; Officer Alfred Roberson testified that giving them that information could have led the bank robber to attempt to escape in a shootout.

[6] There were a couple instances where the tracking device appeared to "jump" to a slightly different location on the APD computer monitor. However, this was a known issue with such tracking devices, because after certain periods the signal needs to move from one satellite to another due to the curvature of the Earth, and thus shows a slightly inaccurate location for a very short period of time. After those few "jumps," the signal went back to its consistent location of being stationary at the corner of Iliff and Buckley.

this group of twenty vehicles made safety concerns increase exponentially. He also testified that he considered whether to let the cars go, and then to try to continue to monitor the movements of the tracking device, but decided against that course of action because of the significant risk that a high-speed chase would ensue, putting his officers and members of the public at significant risk of harm. Lieutenant Lertch also testified that, in weighing the risks involved, he determined that the appropriate course was to contain the scene, to "slow it down," and to implement APD-approved operational tactics to keep everyone "safe and alive."

Lieutenant Lertch also requested of the APD dispatch that a handheld beacon be brought to the scene as soon as possible. Lertch was advised by dispatch that an Investigator with the Federal Bureau of Investigation's Rocky Mountain Safe Streets Task Force ("FBI Task Force") would be arriving on the scene within 20-30 minutes. After that amount of time had passed, Lertch requested an update, and was told that it would be another 20-30 minutes. At that time, Lertch requested to speak to the FBI Task Force Investigator directly. FBI Task Force Investigator T.J. Acierno telephoned Lertch and told Lertch that Acierno was on I-70 near Quebec Avenue (approximately 13 miles from the scene). Lertch impressed upon Acierno the importance of getting to the scene as quickly as possible.

Acierno had been off-duty at his home in Broomfield, Colorado – approximately 30 miles from the scene – when he had received the alert regarding the bank robbery and the GPS tracking device being taken. After hearing this alert, Acierno had to first travel to the FBI Task Force office in northwest Denver to pick up the handheld beacon. While en route, Acierno also notified FBI Task Force Officer Patrick Williams regarding

the situation, and Williams also began making his way to the scene from his home in Firestone, Colorado (approximately 45 miles from the scene).

Prior to Investigator Acierno's arrival, at approximately 4:30, occupants of three of the twenty vehicles were removed from their vehicles. During the entire event, officers had been training their eyes on the vehicles' occupants, looking for any suspicious activity or movement within the vehicles. In two of the three vehicles at the back of the group of twenty cars, officers had noted suspicious activity. Specifically, Officer Jordan Odneal noticed a male in a white Ford Expedition ("SUV") acting suspiciously, moving around in his seat, and looking around a lot. At one point, the individual in the SUV also pulled his hands inside the vehicle, after having them outside the vehicle as ordered. Lieutenant Lertch ordered that that individual be removed from his SUV. That individual was Defendant.

A group of four officers formed a team to conduct a "high-risk traffic stop." The officers approached the SUV from the back, with weapons drawn and deploying ballistic shields. They ordered Defendant to get out of the vehicle and lay down on the ground. Officers approached him, handcuffed him, and brought him into what Lieutenant Lertch described as "protective custody," sitting on the curb a distance away from the vehicles to the west (behind the vehicles). The officers did the same with the other vehicle in which the driver was acting suspiciously, which was directly behind Defendant's SUV. The driver of the third vehicle was removed for tactical reasons.[7] After those three

[7] An officer testified that the occupant of the third vehicle, which was next to Defendant's SUV, was removed in order to entirely clear the back two rows of vehicles, to keep all of the remaining potential threats in one area.

individuals were removed from their vehicles, Lieutenant Lertch ordered officers to await further orders until the handheld beacon arrived on scene.

During the time the occupants of the three vehicles were detained on the curb, an Officer Benedict, who was in charge of guarding those individuals, asked the individuals for consent to search their vehicles. When Defendant was asked, Defendant told Officer Benedict that Defendant wanted to speak with his lawyer. After Officer Benedict explained to Defendant that he was not a suspect yet, and that consent to search was voluntary, Defendant repeated that he wanted to speak to his lawyer. According to Officer Benedict, he informed, among others, Sergeant Kenneth Braunlich of the fact that Defendant had requested to speak to his attorney.

Investigator Acierno finally arrived on the scene at Iliff Avenue and Buckley Road at 4:55 p.m. (approximately 54 minutes after the initial stop). Upon his arrival, Acierno began walking with the handheld beacon around and between the twenty vehicles, attempting to determine in which vehicle the tracking device was located. He got only a weak signal from Defendant's SUV, and did not get a signal from any of the other vehicles. He was, however, not confident in his ability to use the beacon properly, given how infrequently he had been asked to employ this equipment in the past. Defendant Thrapp had testified that there were 6-8 officers in the FBI Task Force who had been trained on the use of the beacon (Officer Acierno being one of them), but that only two of them were experts in the use of the beacon, one of them being Officer Patrick Williams, who was en route.

Once Lieutenant Lertch learned of Investigator Acierno's lack of confidence using the device, and his inability to get a strong signal from any vehicle, Lertch decided to

have the occupants of the remaining seventeen cars removed from their vehicles. The same high-risk traffic stop techniques were used on the remaining vehicles, with officers approaching the cars from behind in teams with weapons drawn. Several guidelines appear to have been followed, at least for the most part. No children were handcuffed. For any vehicles containing "full families" – a male, female, and children – the adults in those vehicles were not considered suspects, and were not handcuffed.[8] Adults traveling alone or with another adult were considered suspects for the time being, and were handcuffed.[9] At least in some cases, officers pointed their weapons directly at adults being removed. All of these individuals were also brought to the back of the group of stopped cars, and seated on the sidewalk with the original three detainees. All individuals were removed from their vehicles by approximately 5:25 p.m.

Officers then conducted a "secondary search" of the vehicles, walking along the outside of vehicles and looking through car windows to verify that there was no one else hiding within any of the vehicles. During this secondary search, at approximately 5:28 p.m., Officer Alfred Roberson broadcast over his radio that he had located a piece of evidence in the front passenger seat of Defendant's SUV. Specifically, through the closed front passenger side window, Roberson saw a $2,000 bank "money band," a slip of colored paper from banks that wraps around a stack of bills. Lieutenant Lertch went

[8] In the case of Sommer Carter, a woman who was traveling with her eleven-year-old son, she was handcuffed for a brief period of time after being removed from her vehicle.

[9] Officer Alfred Roberson testified that it was assumed that the suspect could have picked up someone else prior to being stopped at the traffic stop. Indeed, the tracking device had been reported as stopped at a residence on Greenwood Drive.

over to Defendant's SUV, and also witnessed the money band through the window of the SUV. Several other officers also witnessed the bank money band.

Shortly after the officers observed the money band in Defendant's SUV, Trooper Patrick Williams, an expert in the use of the handheld beacon, arrived on the scene. After using the beacon for a short period of time, Williams got a "very strong" signal on the beacon that the tracking device was located within Defendant's SUV. Trooper Williams informed Lieutenant Lertch of this fact. At that point, Lieutenant Lertch directed that Defendant be placed in the back of a police car. The other detainees were then released and allowed to leave the scene in their vehicles, and traffic was resumed in all directions through the intersection of Iliff Avenue and Buckley Road.

At some point after Defendant was put in the back of a patrol car, Sergeant Braunlich went to speak with him. Sergeant Braunlich asked Defendant if any officers had asked him for consent to search his vehicle, and Defendant responded yes, but that he had told the officer that he did not want anyone to search his vehicle. According to Sergeant Braunlich, the Sergeant then told Defendant something to the effect of "Sir, you are not under arrest, pending the outcome of our investigation. This is a very serious investigation. Your cooperation would be appreciated." According to Sergeant Braunlich, Defendant, after some hesitation, eventually gave consent to search his vehicle. A short time later, Sergeant Braunlich also asked Defendant if he had any firearms in the vehicle. Defendant responded something to the effect of, "Yes, I have a Glock and a Walther handgun inside the vehicle."

Ultimately, Defendant's SUV was searched. Officers Roberson and McDowell conducted the search, with Crime Scene Investigator Harrell taking photographs of the

evidence found. Among other evidence, the following was found in Defendant's SUV: currency totaling $22,956.00, a loaded handgun within reach of the driver's seat, another loaded handgun in the back of the car, additional boxes of ammunition, a mask, a wig, a pair of gloves, an empty air horn package, two fake license plates, and the GPS tracking device in one of the stacks of money. Trooper Williams turned off the tracking device, and dispatch confirmed that the satellite signal of the tracking device that dispatch had been following had become deactivated.

II. BURDEN OF PROOF

It is undisputed that the officers did not have a warrant when they stopped traffic or when they conducted the search of Defendant's SUV. On a motion to suppress evidence obtained during a warrantless search or seizure, the Government bears the burden of proving the reasonableness of the search or seizure. *See, e.g.*, *United States v. Maestas*, 2 F.3d 1485, 1491 (10th Cir. 1993) ("As a general matter, if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution. . . . [Thus,] when the defendant challenges a warrantless search or seizure the government carries the burden of justifying the agents' actions.") (internal quotations omitted).[10] On the first

[10] There is some conflict in the Tenth Circuit case law on this point. In fact, some cases appear to hold that the Government always bears the burden of proof on a motion to suppress, *see United States v. Kitchell*, 653 F.3d 1206, 1216 (10th Cir. 2011); *United States v. Chavez*, 534 F.3d 1338, 1343 (10th Cir. 2008); while other cases seem to hold that the defendant always bears the burden of proof, *United States v. Moore*, 22 F.3d 241, 243 (10th Cir. 1994); *United States v. Betancur*, 24 F.3d 73, 77 (10th Cir. 1994). Other cases, like *Maestas*, hold that the question depends on whether or not the search or seizure was conducted pursuant to a warrant. *See also United States v. Herrera*, 444 F.3d 1238, 1242 (10th Cir. 2006); *United States v. Bute*, 43 F.3d 531, 534 (10th Cir. 1994); *United States v. Finefrock*, 668 F.2d 1168, 1170 (10th Cir. 1982).

day of the evidentiary hearing, the Government conceded that it had the burden of proof on the issues raised in the Motion. Given this concession and the supporting case law, the Court holds that the Government has the burden here of proving the reasonableness of the officers' actions in this case.

III. ANALYSIS

The Fourth Amendment to the U.S. Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." However, "[t]he Amendment says nothing about suppressing evidence obtained in violation of this command. That rule – the exclusionary rule – is a prudential doctrine created by this Court to compel respect for the constitutional guaranty." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011).

A. The Initial Traffic Stop

In his Motion, Defendant first argues that the traffic stop was not supported by reasonable suspicion that any one particular individual stopped at the intersection of Iliff Avenue and Buckley Road had committed the bank robbery, and therefore the stop did not comport with *Terry v. Ohio*, 392 U.S. 1 (1968) ("*Terry*"), and its progeny. (ECF No. 16, at 8-10.) Defendant also argues that the traffic stop was not a constitutional roadblock under the governing case law[11] because the governmental interests in effecting the stop were outweighed by the magnitude of the interference with the liberty

[11] *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Brown v. Texas*, 443 U.S. 47 (1979); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Lidster*, 540 U.S. 419 (2004).

of the twenty-nine stopped individuals detained at the subject intersection. (*Id.* at 12-15.) In response, the Government disagrees, arguing that the roadblock, although a "seizure" of all of the individuals stopped, was constitutional because it had a proper purpose and was implemented in a reasonable manner, given the exigent circumstances under which the law enforcement personnel involved were operating. (ECF No. 18, at 7-12.)

Cases in which an officer stops a pedestrian on foot or a motorist in a car are generally governed by *Terry* and its progeny. Under that case law,

> [A] law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. . . . The officer's action must be justified at its inception, and reasonably related in scope to the circumstances which justified the interference in the first place.

Hiibel v. Sixth Judicial District Court of Nev., Humboldt Cnty., 542 U.S. 177, 185-86 (2004) (citations, quotation marks, and ellipses omitted). Such stops normally require not only reasonable suspicion, but also individualized suspicion. *See United States v. Cortez*, 449 U.S. 411, 417 (1981). As the Government appears to concede, at the time of the stop of the twenty vehicles, the officers did not have reasonable suspicion that Defendant in particular (or any other specific individual among the approximately 29 person detained) had committed the bank robbery.

However, although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). Instead, "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson v. California*, 547 U.S. 843, 855

n.4 (2006). Thus, "special law enforcement concerns will sometimes justify highway stops without individualized suspicion." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (citing *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding constitutionality of sobriety checkpoint), and *Martinez-Fuerte*, 428 U.S. 543 (upholding constitutionality of Border Patrol checkpoint)). So, as the Supreme Court pointed out in *City of Indianapolis v. Edmond*, "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up . . . to catch a dangerous criminal who is likely to flee by way of a particular route." 531 U.S. 32, 44 (2000).[12] In determining the constitutionality of such a roadblock, "we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" *Lidster*, 540 U.S. at 427 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

Under the particular facts and circumstances of this case, the Court holds that the officers' initial stop of the twenty vehicles was reasonable, and therefore did not violate the Fourth Amendment. Applying the statement of law cited immediately above from *Edmond*, the roadblock here was, without a doubt, designed "to catch a dangerous criminal . . . ." *Edmond*, 531 U.S. at 44. At the time the 20 vehicles were detained, the Aurora Police Department was seeking an armed individual whom they knew had

[12] *See also United States v. Davis*, 143 F. Supp. 2d 1302, 1307 (M.D. Ala. 2001) ("[A] roadblock can be a blunt and sweeping and yet very intrusive tool that is essentially an exception to the fourth amendment's individualized probable-cause or suspicion-based determination, and thus must be justified by more evidence of a pressing and legitimate public need for it. In other words, where probable cause for stopping any one vehicle is lower, the exigent circumstances necessary to justify it—that is, the gravity of public concern—must be greater.") (citation omitted).

robbed a bank with the use of a visible handgun, clearly designed to instill fear in the individuals in the bank, and creating the potential for a fatal shooting at the bank. In the Court's view it was entirely reasonable for the officers to assume that the robber continued to be armed and dangerous, especially given the fact that the mass traffic stop was effected less than 15 minutes after the bank robbery itself had taken place.[13]

In addition, the dangerous criminal here was more than just "*likely* to flee by way of a particular route." *Id.* (emphasis added). Instead, the officers here had near certain information that the robber was within one of the twenty vehicles. Specifically, the evidence presented at the hearing established the reliability and accuracy of the GPS tracking of the planted device to within a 30-foot radius. The evidence also established that the device was tracked at speeds indicating that the device was within an automobile. The evidence further established that Officer McDowell knew that the device was traveling eastbound on Iliff Avenue, and then contemporaneously (1) heard from dispatch that the tracking device had stopped at the corner of Iliff Avenue and Buckley Road, and (2) visually witnessed the group of vehicles stop eastbound on Iliff at the corner of Iliff Avenue and Buckley Road, making it a near certainty that the device was within the group of twenty vehicles. And finally, although it is certainly possible that the bank robber might not be in the same location as the tracking device, that possibility was small and so the officers acted reasonably in assuming the bank robber was in one of the twenty vehicles. Given that officers were attempting to catch a dangerous criminal, and

[13] Defense counsel elicited testimony at the hearing indicating that the officers knew that no shots had been fired at the bank and that no one had been injured. That fact is inconsequential to the analysis here. The mere fact that a bank was robbed at gunpoint made the suspect potentially very dangerous.

had fairly precise information regarding his location, the first two *Brown v. Texas* factors – "the gravity of the public concerns served by the seizure" and "the degree to which the seizure advances the public interest" – weigh heavily in favor of a finding that the initial stop was reasonable. *Lidster*, 540 U.S. at 427 (quoting *Brown*, 443 U.S. at 51).

One could argue that the officers instead should have continued tracking the device in order to possibly narrow down the location of the device to a particular vehicle. The Court rejects such an argument for several reasons. First, evidence at the hearing established that traffic was moderate-to-heavy at the time, and the area of Aurora involved was a commercial/residential area. Thus, unlike the tracking of a GPS device in a rural area, for example, the Court is not convinced that officers would have been able to narrow down the device's location to any one particular vehicle by following the signal for a longer period of time.[14] Second, numerous officers in different patrol cars were close to the scene when traffic was stopped. If officers had begun following the device, particularly for an extended period, the chance that the robber would have realized he was being followed would have increased significantly, very possibly leading to a high-speed chase endangering the lives of the officers, innocent motorists, and pedestrians. *See, e.g.*, *United States v. Thompson*, 393 F. App'x 852 (3d Cir. 2010) (case in which officers followed a minivan suspected of containing a GPS tracking device embedded in a stolen stack of money, and a high-speed chase ensued during which the minivan struck

[14] For example, under such urban conditions, certain cars could pull off a particular roadway, but other cars could pull onto the same roadway. This, in addition to the diffuse accuracy of the GPS device to within a 30-foot radius, means that following the signal longer and ultimately stopping traffic later at another intersection could still likely result in the stop of a large number of vehicles.

another vehicle). And third, evidence was presented at the hearing on the Motion to Suppress that there had been other bank robberies in the Denver metropolitan area in the past where GPS tracking devices had been thrown out of vehicles or destroyed, such that the robbers could no longer be tracked, making the officers' decision to act sooner rather than later more reasonable. Given these factual circumstances, the Court declines to second-guess the officers' decision to stop the twenty vehicles when they did. *See Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) ("[R]easonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight and . . . the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving.") (internal quotations and brackets omitted).

Even though the initial stop was justified, however, [t]his is not . . . the end of a *Terry* analysis. Although the seizure was reasonable at its inception, we must determine whether it was reasonable as conducted." *United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993). Applying the statement of law from *Edmond*, the question turns to whether the roadblock was "appropriately tailored." *Id.* Or, stated another way, the analysis turns to the third *Brown v. Texas* factor – "the severity of the interference with individual liberty." *Lidster*, 540 U.S. at 427 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979). The Court proceeds to address the ultimate length and invasiveness of the traffic stop at issue.

B. The Invasiveness and Duration of the Stop

In his briefs, argument presented at the evidentiary hearing, and examination of witnesses at the hearing, Defendant's primary focus has been on the invasiveness and

duration of the stop, which Defendant alleges amounted to a "mass arrest." (ECF No. 16, at 9-15.) In arguing that the mass arrest was unconstitutional, Defendant has not only emphasized the invasiveness and duration of the stop on his own individual liberties, but also the effect of the stop on the other twenty-eight some stopped individuals.[15]

1. Invasiveness

There are no bright-line rules demarcating the difference between a *Terry*-stop (requiring reasonable suspicion) and an arrest (requiring probable cause). However,

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[15] There is at least a mild tension in the law regarding the relevance of the effect of the stop on the other twenty-eight individuals. On the one hand, certain cases have held that individuals cannot normally assert the constitutional rights of others. *See, e.g.*, *United States v. Valdez Hocker*, 333 F.3d 1206, 1208 (10th Cir. 2003) ("Fourth Amendment rights are personal and cannot be claimed vicariously. It is immaterial if evidence sought to be introduced against a defendant was obtained in violation of someone else's Fourth Amendment rights.") (citation and quotation marks omitted); *cf. Camacho v. Brandon*, 317 F.3d 153, 159 (2d Cir. 2003) ("A plaintiff may assert the constitutional claims of a third party if the plaintiff can demonstrate: (1) injury to the plaintiff, (2) a close relationship between the plaintiff and the third party that would cause plaintiff to be an effective advocate for the third party's rights, and (3) some hindrance to the third party's ability to protect his or her own interests."). On the other hand, cases addressing the constitutionality of roadblocks, in considering "the severity of the interference with individual liberty," necessarily consider at least the policy implications of the impact of roadblocks on the liberties of innocent individuals.

On a related matter, the Court notes that the leading case in which the Supreme Court held a roadblock to be unconstitutional – *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) – was a civil class action seeking declaratory and injunctive relief against the practice of implementing the challenged roadblocks. Here, however, we have a single-defendant criminal action in which the defendant emphasizes the invasiveness of the traffic stop on all of the stopped individuals, and in so doing seeks the suppression of evidence in the case against him. One could reasonably argue that a multi-plaintiff 42 U.S.C. § 1983 action would be the more appropriate way to challenge the overall impact on the other twenty-eight individuals of the APD officers' actions in this case.

Erring on the side of caution, however, the Court will consider both the invasiveness and duration of the stop as it affected Defendant himself, and the overall invasiveness of the stop on the twenty-nine individuals involved.

the law in the Tenth Circuit makes clear that, given sufficient exigent circumstances, a *Terry*-stop can involve invasive techniques by officers that would normally resemble traditional arrest. In *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), for example, the Court held that officers acted reasonably in effecting a *Terry*-stop that involved pointing their weapons at the suspect and ordering him to lie face down on the ground. *Id.* at 1461-63. In so doing, the Court highlighted "the recent trend [in the law] allowing police to use handcuffs or place suspects on the ground during a *Terry* stop. Nine courts of appeals, including the Tenth Circuit, have determined that such intrusive precautionary measures do not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment." *Id.* at 1463 (citing cases); *see also United States v. Shareef*, 100 F.3d 1491, 1502 (10th Cir. 1996) ("The use of firearms, handcuffs, and other forceful techniques does not necessarily transform a *Terry* detention into a full custodial arrest – for which probable cause is required – when the circumstances reasonably warrant such measures. Such measures are warranted, however, only if the facts available to the officer would warrant a man of reasonable caution in the belief that the action taken was appropriate.").

Under the particular circumstances here – most important of which was the fact that officers were attempting to apprehend a dangerous criminal who had just robbed a bank at gunpoint minutes before – the Court holds that the mass detention involved did not amount to an "arrest" under Fourth Amendment jurisprudence, but instead remained an investigatory "stop" throughout (for all individuals but Defendant). As for Defendant himself, he was properly arrested based on probable cause when he was put in the back of an APD patrol car. That probable cause is discussed in further detail below, in

discussing the justification for the search of Defendant's SUV.

The question remains, however, whether the invasive techniques used by officers on Defendant and the other twenty-eight individuals involved were reasonable. There is little doubt in the Court's view that the invasiveness with which twenty-seven individuals – the ones who were not acting suspiciously – were removed from their vehicles is the most troubling aspect of the APD officers' actions in this case. Every single vehicle was approached as a "high-risk traffic stop," including approaching the vehicles with weapons drawn and shields deployed, ordering the occupants out of the vehicles, and, in some cases, handcuffing vehicle occupants. These types of actions were certain to "generat[e] concern or even fright on the part of lawful travelers." *Martinez-Fuerte*, 428 U.S. at 558.

The Court questions whether such invasive techniques were necessary to use on all twenty vehicles, as opposed to, for example, only the two vehicles in which occupants were observed moving around inside their vehicles and otherwise acting suspiciously. However, the fact of the matter is that the officers had only very vague suspect information, such that it was reasonable to err on the side of caution and assume that the robber could be any of the stopped adults.[16] Further, the fact that the Court questions whether less invasive measures could have been utilized is, under the

[16] Defendant has emphasized this fact to support his argument that it was unreasonable for officers to engage in the techniques they did without suspicion of any particular individual. However, in the Court's view, that fact cuts both ways. With no specific information regarding which of the twenty vehicles contained the suspect, it can be argued that it was reasonable to effect the same techniques on all twenty vehicles. Also, as the Government argues, to hold otherwise would be to reward Defendant for having robbed the bank and departed the scene without witnesses being able to offer any identifying information of the suspect to the APD.

circumstances, unwarranted second-guessing of the officers' actions here, given that they were attempting to apprehend a dangerous felon in real time. As the Court stated in *United States v. Tilmon*, 19 F.3d 1221 (7th Cir. 1994):

> [P]olice should, of course, use the least intrusive means reasonably available to verify or dispel their suspicions in a short period of time. Nevertheless, the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable. When effecting a *Terry* stop, which is always a stop made at close range, police officers must make a quick decision about how to protect themselves and others from possible danger. They are not necessarily required to adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter. A court in its assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.

Id. at 1225-26 (citations, quotation marks, ellipses, and brackets omitted). The Court is to some extent troubled by the overall invasiveness of the traffic stop, but not enough so to hold that the officers' overall actions were unconstitutional under the circumstances.

The Court also believes it appropriate to emphasize that officers did have sufficient suspicion of Defendant in particular to remove him from his vehicle using invasive tactics. Despite orders to remain still, Defendant was seen moving erratically inside his vehicle and looking around. Also, despite orders to put his hands up through his driver's side window, Defendant was seen moving his hands back inside his vehicle. Under these circumstances, officers without a doubt were justified in their decision to order Defendant out of his vehicle at gunpoint, order Defendant to lie on the ground, and handcuff him. This form of detention did not amount to an arrest of Defendant, but was simply a continuation of the investigative stop, and was reasonable. *See Perdue*, 8 F.3d at 1461-63; *Shareef*, 100 F.3d at 1502.

2. Duration

In terms of the duration of the stop, the evidence indicates that the stop of all individuals (other than Defendant) lasted for approximately one hour and forty-five minutes. Specifically, the stop occurred at 4:01 p.m., and individuals were finally allowed to return to their vehicles at approximately 5:38 p.m. They remained in their vehicles for a short period of time while a Crime Scene Investigator took photographs of the entire area, and then were allowed to leave. Defendant argues that the detention was unreasonably long, and constituted an arrest of all twenty-nine individuals.

An investigative detention "must not exceed the reasonable duration required to complete the purpose of the stop." *United States v. Rice*, 483 F.3d 1079, 1082 (10th Cir. 2007). "On assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . ." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

The Court finds that the length of the detention, although out of the ordinary in terms of its length, was not so long to make it unreasonably under the circumstances. The primary reason for this decision is based on the finding that police officers acted reasonably in waiting until the handheld beacon, along with an expert trained in its use, arrived on the scene. Waiting until this occurred meant that officers would very likely be able to definitively identify the bank robber. Also, Lieutenant Lertch was faced with an ever-changing situation regarding the handheld beacon. First, he was told that it would arrive in approximately 20-30 minutes. Then he was told that it would be another 20-30 minutes. Then Officer Acierno arrived on the scene, but could not use the beacon

effectively. It was not until Trooper Williams finally arrived on the scene that a positive identification was made. These delays were caused more by resource-related and distance issues (or a lack thereof), and less by any true lack of diligence by officers, particularly Lieutenant Lertch and his subordinates. As Defendant argues, that makes this case similar to cases in which courts have upheld the reasonableness of traffic stops that included significant delays, for example, due to the need to get a drug-sniffing dog on scene. *See, e.g.*, *United States v. Frost*, 999 F.2d 737, 741-42 (3d Cir. 1993) (upholding eighty minute detention for drug-sniffing dog to arrive on scene); *United States v. Hbaiu*, 202 F. Supp. 2d 1177, 1182-85 (D. Kan. 2002) (upholding one hour and forty-five minute detention because "the delay [was] attributable to a number of circumstances that were outside of the troopers' control").[17]

Defendant consistently emphasizes that, in the Supreme Court checkpoint cases, the Supreme Court has emphasized that the stops of all motorists must be brief. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (emphasizing that stops must be brief to question motorists for information about fatal hit-and-run accident). The Court agrees, but this case is distinguishable. This is not a case where hundreds, or even

[17] If Lieutenant Lertch had been informed from the outset that it would take nearly an hour-and-a-half for an expert in the use of the handheld beacon to arrive on the scene, the reasonable course may have been to let traffic go at that point, and attempt to continue to follow the signal. That is not the situation presented here, however. The evidence indicated that the delays took place in stages. Lertch was first informed that the device would arrive within 20-30 minutes. Waiting that long for the device to arrive was reasonable. Lertch was then informed that it would be another 20-30 minutes. Waiting that additional period was also reasonable. Lertch then learned that Acierno was not exceptionally skilled in the use of the device. However, the additional delay between Acierno's arrival and Williams's arrival also does not warrant a finding of unreasonableness.

thousands, of vehicles pass through a checkpoint to determine, for example, if any of the motorists have been drinking. This was a much more narrowly tailored roadblock in which a dangerous criminal who had just committed an armed robbery was known to be within a group of twenty cars. Those circumstances, along with the events causing the delays in getting the handheld beacon on scene, made the length of the detention here reasonable.

Ultimately, the Court holds that, despite the invasiveness and duration of the stop not only for Defendant but for all of the individuals involved, but also balancing the governmental interests in catching the bank robber and making sure the robber did not harm any innocent civilians, the officers' actions were sufficiently reasonable under the Fourth Amendment such that suppression of the evidence ultimately found in Defendant's SUV is not warranted.[18]

C. Probable Cause to Search Defendant's SUV

Defendant actually does not present any argument that probable cause did not exist at the time that he was put in the back of the patrol car or at the time that his SUV was searched. Instead, Defendant relies entirely on the argument that the evidence obtained is tainted by the preceding "arrest" of Defendant when he was pulled out of his SUV at gunpoint and handcuffed without probable cause. As the Court has held above,

[18] At oral argument, Defendant's counsel discussed the alleged far-reaching implications of a Court ruling on the Motion to Suppress in favor of the Government, by mentioning the hypothetical of a known dangerous criminal entering a large sports complex containing thousands of people who are ultimately "seized" in some way in order to catch the criminal. The Court concedes that such a case would be a far different one, but counsel's hypothetical is not before the Court. Based on the particular, and actual, facts and circumstances present here, suppression is not warranted.

the officers' actions in removing Defendant from his SUV at gunpoint, handcuffing him, and detaining him for an extended period of time were reasonable under the Fourth Amendment. Therefore, suppression based on Defendant's fruit-of-the-poisonous tree argument is unwarranted.

Also, the Court has little trouble concluding that probable cause existed (1) to arrest Defendant at the time officers put Defendant in the back of the patrol car, and (2) to search his SUV at the time officers conducted the search. When those events occurred, Trooper Patrick Williams, an expert in using the handheld beacon (which was reliable and accurate when used by an expert), had already gotten a "very strong" positive signal that the GPS tracking device was located in Defendant's SUV. Also, several officers, via a plain-view search through Defendant's closed passenger-side window, clearly witnessed the bank money band on Defendant's front passenger seat.[19] Further, officers also knew that Defendant was one of the few individuals (among the twenty-nine) who had acted suspiciously during the initial stop, warranting Defendant's

[19] The Government's Response brief contains a section arguing that the plain-view doctrine authorized the officers to look through Defendant's car window and view the money bank band. (ECF No. 18, at 21.) Defendant failed to respond to this argument in his Reply. The plain-view doctrine, as traditionally applied, is actually not applicable in this case, because officers did not seize the money band directly following their observation of the money band through Defendant's car windows. *See United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (stating that "[t]he 'plain view' doctrine allows a law enforcement officer to seize evidence of a crime" if certain circumstances are met). However, principles underlying the "plain-view doctrine" are present here. Specifically, officers were authorized to look through Defendant's closed car windows in order to attempt to observe evidence of the bank robbery. And the bank money band was incriminating evidence that Defendant may have committed the robbery. Thus, probable cause to search the vehicle was sufficiently supported in part by the officers' lawful discovery of the bank money band sitting on Defendant's front passenger seat.

early removal from his SUV. Under these circumstances, probable cause to arrest Defendant and search the SUV clearly existed. *See United States v. Grubbs*, 547 U.S. 90, 95 (2006) ("Probable cause [to conduct a search] exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place.") (internal quotations omitted); *United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010) ("Probable cause to arrest exists where, under the totality of the circumstances, a reasonable person would believe that an offense has been committed by the person arrested.") (internal quotation marks omitted).[20]

D. Defendant's Statements to Officers

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[20] The fact that Sergeant Braunlich had obtained Defendant's consent to search the SUV at that point is inconsequential. Regardless of whether or not Sergeant Braunlich had obtained Defendant's consent to search the SUV, the SUV would have been searched based on the probable cause that otherwise existed. *See United States v. Sanchez*, 608 F.3d 685, 691 (10th Cir. 2010) (in explaining the inevitable discovery doctrine, the Court stated, "To succeed in suppressing [evidence], [the defendant] must show the discovery [of the evidence] would not have come to light *but for* the government's unconstitutional conduct.") (emphasis in original) (internal quotations omitted).

Although the parties have not so argued, the Court also believes the inevitable discovery doctrine has a broader application in this case. Taking a step back, there is no doubt that the invasiveness of the techniques used by the officers in removing twenty-seven of the twenty-nine individuals from their vehicles is the more troubling aspect of this case. On the other hand, it is the Court's opinion that the initial stop and the duration of the stop, given the circumstances, were clearly constitutional. In addition, the Court believes that the inevitable discovery doctrine properly applies here. Even assuming that the forcible removal of the twenty-seven individuals from their vehicles was unconstitutional, that constitutional violation was not the reason officers were able to establish probable cause to search Defendant's vehicle. *See id.* ("To succeed in suppressing [evidence], [the defendant] must show the discovery [of the evidence] would not have come to light *but for* the government's unconstitutional conduct."). In other words, regardless of how invasive the stop was or was not, officers were justified in stopping the twenty vehicles and detaining Defendant until the handheld beacon and Trooper Williams arrived on the scene. At that point, given the facts presented here, it was inevitable that the officers were ultimately going to obtain probable cause to search Defendant's vehicle.

Defendant also moves to suppress the statements he made to officers – specifically Sergeant Braunlich – regarding consent to search the SUV and the presence of two loaded weapons in the SUV, arguing that the statements must be suppressed under both the Fourth and Fifth Amendments to the Constitution. (ECF No. 16, at 15-19.) In response, the Government focuses only on Defendant's statement to Sergeant Braunlich regarding the presence of weapons in the SUV, arguing that Sergeant Braunlich's pre-*Miranda* query of Defendant regarding firearms was permissible under the public-safety exception to the *Miranda* rule. (ECF No. 18, at 19-21.)

The Court agrees that these statements of the Defendant must be suppressed as obtained in violation of Defendant's Fifth Amendment rights.[21] Building from the foundational case of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court in *United States v. Edwards*, 451 U.S. 477 (1981), held that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484.[22] Here, when police first questioned

[21] Because of this conclusion, the Court need not reach the question of whether the statements should be suppressed under the Fourth Amendment.

[22] Defendant asserts that he was "in custody" for purposes of *Miranda* and *Edwards*, a point the Government does not dispute. The Court agrees. In *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), the Court held that a suspect was in custody for purposes of *Miranda*, even though he had not been arrested but had only been subjected to a *Terry* stop, because of the use of force and handcuffs as part of his detention. In so holding, the Court stated, "a person has been taken into police custody whenever he 'has been deprived of his freedom of action in any significant way.' . . . [A]

Defendant regarding whether he would consent to a search of his vehicle, the evidence indicates that Defendant unequivocally stated that he wanted to speak with an attorney. Rather than cutting off further interrogation of Defendant until his lawyer was present, Sergeant Braunlich later asked Defendant whether he had any weapons in the SUV, and continued to ask him whether he would consent to a search of his SUV.[23] This violated Defendant's Fifth Amendment rights, and so statements that Defendant made in response to this further questioning must be suppressed. *See Edwards*, 451 U.S. at 484.

The Government's sole argument, that the public-safety exception applies here, lacks merit. As stated in *New York v. Quarles*, 467 U.S. 649 (1984), an officer may

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suspect can be placed in police 'custody' for purposes of *Miranda* before he has been 'arrested' in the Fourth Amendment sense." *Id.* at 1463-64 (quoting *Miranda*, 384 U.S. at 444).

[23] Some testimony indicates that at the time Sergeant Braunlich conducted his questioning, Sergeant Braunlich already knew that Defendant had requested to speak to his attorney. However, even if Sergeant Braunlich did not have actual notice of this fact, he was on constructive notice of the fact. *See Arizona v. Roberson*, 486 U.S. 675, 687 (1988) ("[W]e attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that *Edwards* focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.").

Also, although the Government does not argue to the contrary, the Court concludes that all of this questioning constituted "interrogation" for purposes of *Miranda* and *Edwards*. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers . . . to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.").

question a suspect in custody without first giving *Miranda* warnings if the questions arise out of "an objectively reasonable need to protect the police or the public from any immediate danger associated with a weapon." *Id.* at 659 n.8. The public-safety exception applies not only to interrogation that occurs prior to the giving of *Miranda* warnings, but also applies to interrogation that occurs after a suspect has requested to speak to an attorney. *See United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989). For the public-safety exception to apply, the officer at a minimum "must have a reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it." *United States v. DeJear*, 552 F.3d 1196, 1201 (10th Cir. 2009) (internal quotations omitted).

In the two cases cited by the Government, significant exigency existed that warranted pre-*Miranda* questioning as to the presence of firearms. Specifically, in *DeJear*, the questioning took place while the suspect and other individuals were still in their car, and where the suspect had stuffed something next to his car seat and had refused a request to show his hands. And in *United States v. Lackey*, 334 F.3d 1224 (10th Cir. 2003), at the time of the questioning, the suspect – who was suspected of illegally discharging a firearm – had already been handcuffed by officers but had not yet been patted down for weapons. In both of the situations presented in those cases, the questioning was necessary to ensure the safety of the officers involved.

Here, however, the evidence indicates that Defendant was handcuffed and in a location significantly removed from his SUV when he was questioned about the presence of firearms in his vehicle. Unlike *DeJear*, Defendant was not still in his

vehicle, and unlike *Lackey*, the concern was not that Defendant had a weapon on his person. With the multitude of heavily armed officers on site, there was no realistic risk of Defendant being able to regain access to any weapons in his vehicle. Also, the evidence indicates that officers had already fully "secured the scene" with respect to Defendant's SUV at the time of the questioning at issue, with a multitude of heavily armed officers already having conducted secondary searches of the vehicles. Thus, there was also no realistic risk that, for example, someone else was still hiding in Defendant's SUV or that some accomplice among the pedestrian onlookers could have gained access to the inside of the SUV. Under the circumstances present here, the public-safety exception did not apply to Sergeant Braunlich's query regarding the presence of firearms in Defendant's SUV.

The Court, however, agrees with the Government that this conclusion does not warrant the suppression of any evidence found in the SUV (as opposed to the suppression of Defendant's statements). Even absent Defendant's statement regarding the presence of weapons in the SUV, the officers had probable cause to search Defendant's SUV, and the evidence indicates that they would have conducted that search pursuant to the probable cause that existed. And during the search, the firearms would have been located regardless of whether or not Defendant had made any statement regarding their presence in the SUV. *See United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005) ("The inevitable discovery doctrine provides an exception to the exclusionary rule and permits evidence to be admitted if an independent, lawful police investigation inevitably would have discovered it.") (internal citations and quotations omitted).

IV. CONCLUSION

In accordance with the foregoing, the Court hereby ORDERS as follows:

(1) Defendant's Motion to Suppress Evidence and Statements (ECF No. 16) is GRANTED IN PART and DENIED IN PART.

(2) Defendant's Motion is GRANTED in that Defendant's statements to officers will be SUPPRESSED as obtained in violation of the Fifth Amendment;

(3) In all other respects, including as to all evidence obtained during the search of Defendant's vehicle, Defendant's Motion is DENIED; and

(4) All deadlines and a trial date will be re-set via separate order of the Court.

Dated this 23rd day of October, 2012.

BY THE COURT:

William J. Martínez
United States District Judge